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The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases

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At the heart of most criminal cases is a dispute about facts. Legal systems have devised a range of procedures for collecting evidence and bringing it to the attention of the factfinder who is to resolve the dispute.[1] At the end of that process, the factfinder holds the metaphorical scales of Justice, the evidence goes into the balance pans, and the scale registers a result. The factfinder is not, however, left simply to weigh the evidence and report which side is heavier. Courts and legislatures have developed a substantial array of legal rules that tinker with the factfinding process, in effect putting a thumb on the scale.[2]

Among the most important of these rules are those that tell the factfinder how to decide close cases, and when to regard a case as close.

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1. For the growing literature on the differences between the adversary methods for collecting evidence in Anglo-American law, and the nonadversary methods of continental law, see Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975) and sources cited, *id.* at 1083 n.1.

2. This article examines the rules that regulate the burden of persuasion in criminal cases, and considers to some extent the rules that regulate the burden of producing evidence, *see* note 3 *infra*. Other rules specify that certain evidence is of *limited value* in factfinding, *e.g.*, cautionary instructions or corroboration requirements for accomplice testimony, *see* 7 J. WIGMORE, EVIDENCE § 2056 (3d ed. 1940); or that certain evidence is *necessary* to support a finding, *e.g.*, the Constitutional requirement of two witnesses or a confession for a conviction of treason, U.S. CONST. art. III, § 3, cl. 1; or that certain evidence is *sufficient* to support a finding, *e.g.*, inferences or presumptions that either permit or direct the factfinder to infer one fact from evidence that proves some other fact. Devices in this last category take many forms, and the labels "inference" and "presumption" are used without consistent meaning; for a catalogue, ➞ Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 195-209 (1953), and a helpful chart in R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 884 (1977). For a good discussion of the relationship between these devices and rules regulating the burden of persuasion and the burden of producing evidence, s➞ Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969).

In the established terminology, these rules regulate the burden of persuasion.[3] This burden is said to have both a location and a weight: the location specifies the party that loses if the burden is not met, and the weight specifies how persuasive the evidence must be in order to carry the burden.

The common metaphor of carrying burdens may obscure more than it enlightens. It seems helpful instead to think of the rules as defining the zone in which the dispute over facts is too close for decision by the factfinder, and providing a rule for the decision of such cases. Thus, a rule fixing the weight of the burden defines the zone in which the factfinder is to regard the dispute as too close for decision, and a rule fixing the location tells the factfinder who wins when the case is in that zone.[4]

On either view of the rules, their intended effect is the same. In

3. An unfortunate confusion of terminology requires some clarification. A distinction must be made between the burden of persuasion, which regulates the decision of close cases by the factfinder, and the burden of producing evidence, which specifies the result when the evidence on an issue is nonexistent, or inadequate to satisfy some threshold requirement. A rule assigning the burden of producing evidence is one kind of rule specifying the evidence necessary to support a finding. It has two important features: first, like a rule assigning the burden of persuasion, it provides that when the evidence is inadequate, the party with the burden loses; second, unlike a rule assigning the burden of persuasion, it operates in a jury trial to remove the issue from the jury. When the burden of producing evidence is not satisfied, the judge resolves the issue. This second function, of allocating issues between judge and jury, is the aspect of the rule most commonly discussed, and indeed it is the only function of the rule if the same party has both the burden of producing evidence and the burden of persuasion. *See* McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955). But it is also possible to assign the burden of producing evidence to the party who does not have the burden of persuasion. In that case, the rule does not only allocate issues between judge and jury; it has an effect even in a trial to a judge. The effect is to create a trigger mechanism: when the evidence on an issue is nonexistent or inadequate to meet the threshold requirement, the party with the burden of producing evidence loses; once there is enough evidence to cross that threshold, then the issue counts as a contested issue and the loss falls on the other party, the one with the burden of persuasion, unless the evidence for his position satisfies that burden.

The distinction between the burden of persuasion and the burden of production is usually attributed to Thayer. *See* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 355-59 (1898).

Before the distinction had been illuminated by commentators, the term burden of proof was commonly used for both matters and to some extent that confusing usage continues. It will be avoided in this article.

4. The metaphor of carrying burdens is confusing for two reasons. First, it suggests, inaccurately, that the law is concerned with the extent of a party's labors, when in fact the evidence that satisfies the burden may be introduced by either party. Second, it seems implausible to tell the factfinder to reach a decision, attach a probability estimate to that decision, and then use a legal rule about burdens to translate the decision into a verdict, sometimes translating a decision for *A* into a verdict for *B*. Once he has decided, it seems odd to use a rule to tell him to change his decision. It is more sensible, and truer to the purpose of the rule, to tell him not to decide when he cannot be sure enough, and then to provide a legal rule to make the decision for him in such cases.

civil cases, the location of the burden of persuasion may vary from one issue to another, and its weight is usually proof by a preponderance of evidence.[5] In the terms used here that means a factual dispute is too close for decision if the two sides are in equipoise; in that event, neither side can be said to have a preponderance of evidence and therefore the party with the burden loses. In criminal cases, the burden of persuasion for most issues is placed on the government, and the weight of that burden is proof beyond a reasonable doubt. Under a reasonable doubt rule the zone of uncertainty is larger; so long as the evidence is not overwhelming, the dispute is too close for decision, and the loss falls on the government as the party with the burden.[6]

The requirement of proof beyond a reasonable doubt in criminal cases was given constitutional status by the Supreme Court in 1970, in the case of In re *Winship*,[7] which held that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[8] The holding restated the general understanding of the rule governing proof in a criminal case. The reasonable doubt requirement had been recognized in Anglo-American law since

5. F. JAMES, CIVIL PROCEDURE § 7.6 (1965); *see* 9 J. WIGMORE, EVIDENCE § 2498 (3d ed. 1940 & Supp. 1975). Some issues in a civil case must be proved beyond a reasonable doubt, as in a criminal case, and some must be proved by clear and convincing evidence, which is an intermediate standard.

6. Note that in these terms a criminal case is "close" if the evidence is evenly balanced, and also if the evidence somewhat favors either the government or the defendant. In the criminal context, such cases are generally regarded as easy to decide and not close at all, but that is because the reasonable doubt rule clearly requires an acquittal, and not because the factual dispute is easy to resolve. In the terminology of this article, they are close cases on the evidence, easily decided only because of the rule that puts a thumb on the scale.

Acquittals in criminal cases sometimes represent the factfinder's determination that the defendant is clearly innocent, and sometimes result simply from the application of the rule for resolving close cases. This collapsing of categories occurs in civil cases, too, when the decision goes against the party with the burden of persuasion. But in criminal cases, because the zone of uncertainty is larger, the acquittals resulting from the rule may seem to dwarf those that represent a positive finding of innocence. For that reason it is often said that an acquittal is not a finding of innocence, but only a refusal to find guilt. *See, e.g.*, Helvering v. Mitchell, 303 U.S. 391, 397 (1938). *But see* Coffey v. United States, 116 U.S. 436, 444 (1886). On this view, it might be said that an acquittal of a guilty person cannot be characterized as erroneous, but only as (at worst) undesirable. Nevertheless, this article will refer to such decisions as erroneous or inaccurate, in order to have a convenient way of describing the event of acquitting a guilty person. It is hardly misleading to call such an acquittal erroneous, because an acquittal functions not as a refusal to decide but as a decision that concludes the matter in dispute. Unlike a hung jury, which leaves the matter open for future resolution, United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824), an acquittal bars any further criminal proceedings, Benton v. Maryland, 395 U.S. 784, 795-96 (1969).

7. 397 U.S. 358 (1970).

8. *Id.* at 364.

at least 1798, and probably for several centuries before that.[9] Indeed, the occasion for announcing the constitutional status of the rule arose only as a preliminary step in considering whether the same rule should govern proof in an adjudication of juvenile delinquency.[10]

Nevertheless, the constitutionalization of the rule has generated substantial controversy. For despite widespread acceptance of the general requirement of proof beyond a reasonable doubt, the disagreement over the proper scope of the rule is equally widespread. Most American

9. A well-known article traces the formula to the Irish Treason Trials of 1798, Finney's Case, 26 How. St. Tr. 1019 (Ire. 1798), and Bond's Case, 27 How. St. Tr. 523 (Ire. 1798). May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 656-58 (1876). Most courts and commentators have subscribed to that view. *E.g.*, C. MCCORMICK, EVIDENCE § 341, at 799 & n.88 (2d ed. E. Cleary 1972); 9 J. WIGMORE, EVIDENCE § 2497 (3d ed. 1940). A recent reexamination of the theory of the rule traces the phrase back even earlier, to the Boston Massacre Trials of 1770, Rex v. Wemms, *reported in* 3 LEGAL PAPERS OF JOHN ADAMS 98-314 (L. Wroth & H. Zobel eds. 1965). Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 515-19 (1975). Morano argues that prior to the articulation of this standard, and its incorporation into English and American law over the course of a century, the prevailing rule was even stricter, requiring proof beyond *any* doubt, reasonable or not. *Id.* at 511-13. Here his evidence is somewhat less compelling. He cites (1) a 13th-century treatise stating that jurors should acquit "'if [they] are in doubt of the matter and not certain,'" *id.* at 510 (quoting 1 BRITTON 26-27 (8th ed. F. Nichols trans. 1901)); (2) several 17th-century English cases requiring jurors to acquit if they are not "satisfied in their consciences" of guilt, Morano, *supra* at 511-12 & n.37; and (3) several 18th-century English cases requiring jurors to acquit "if they had *any* doubt of the accused's guilt," *id.* at 512 & n.43 (emphasis in original). In addition, he cites the work of 17th-century philosophers and 18th-century commentators who argued that "moral certainty" was the correct standard, moral certainty being reasonable, rather than absolute, certainty. *Id.* at 513-14. Morano argues persuasively that the reasonable doubt formulation was intended to caution against the use of an impossibly high standard; it is less clear from his evidence that prior to its adoption a more stringent standard was in fact in force. For the 13th-century, at least, the evidence seems inconclusive: "Presumably [13th-century jurors] had to have become convinced to the point of virtual certainty, but we cannot determine by what standards they were to assess the evidence and testimony brought to their attention before or during tria➞ Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 413, 424 n.45 (1976). It is unclear, then, whether Anglo-American law ever provided for the trial of a criminal case under a standard more stringent than proof beyond a reasonable doubt; there is no suggestion that any less stringent standard has ever sufficed. A special and high standard of proof has apparently been required of the government in criminal cases in England and America from earliest times.

10. The Court held that it should. 397 U.S. at 368. More precisely, the Court held the standard applicable to an adjudication of delinquency based on conduct that would constitute a crime for an adult—here larceny, with a possible maximum sentence for the juvenile of six years in a training school. Judgment was expressly reserved with respect to delinquency proceedings not based on criminal conduct, and to the dispositional phase of any delinquency proceeding. 397 U.S. at 359 n.1.

Two of the three dissenters (Chief Justice Burger in an opinion joined by Justice Stewart) conceded the validity of the rule for adult criminal trials, limiting their objection to the extension of that rule to juvenile proceedings. 397 U.S. at 375-76. Only Mr. Justice Black questioned the constitutional source of the requirement of proof by the government beyond a reasonable doubt in an adult criminal trial, failing to find any explicit constitutional language on the matter. 397 U.S. at 377 (Black, J., dissenting).

jurisdictions have declined to apply that requirement to the proof of every issue of fact in a criminal case. The burden of persuasion is assigned to the defendant for some issues, so that in a close case the prosecution wins. For other issues even though the burden remains on the government, the weight of that burden is proof by a preponderance of evidence, as in a civil case.

Almost every issue that has ever been denominated a "defense" to a criminal charge has been exempted in some jurisdiction from the requirement of proof by the government beyond a reasonable doubt, either through reduction of the government's burden or through allocation of the burden to the defendant. Sometimes allocation of the burden of proving an issue to the defendant is in fact what is meant by characterizing that issue as a "defense," or more commonly, as an "affirmative defense," though usage in this matter is not standardized.[11] Defendants have been required to prove self-defense,[12] duress,[13]

11. The Model Penal Code uses the term "defense" without definition. "Affirmative defense" is used to identify matters for which the defendant bears the burden of going forward with some evidence but the government bears the burden of persuasion. The Model Code employs no specific term for those enumerated issues for which the defendant bears the burden of persuasion. MODEL PENAL CODE § 1.12(2).

The proposed revision of the Federal Criminal Code uses the term "defense" to mean anything designated as a defense or exception from criminal liability. It uses "affirmative defense" to mean a defense for which the defendant bears the burden of persuasion. S. 1437, 95th Cong., 1st Sess. § 111 (Comm. Print May 2, 1977).

While statutes use the terms "defense" and "affirmative defense" in various ways, some commentators speak of true defenses or true affirmative defenses. *See, e.g.*, G. Dix & M. Sharlot, CRIMINAL LAW CASES AND MATERIALS 1034 (1973); Note, *Constitutionality of Affirmative Defenses in the Texas Penal Code*, 28 BAYLOR L. REV. 120, 121 (1976). This usage suggests that there are some natural or correct criteria for classifying the factual issues that specify the conditions for criminal conviction: some are properly part of the definition of crime, others are defenses, and still others are affirmative defenses. This tripartite division may follow the division into offensive conduct, justification, and excuse, or it may follow some other principle.

This sort of classification may well provide an orderly or parsimonious description of the criminal law, or facilitate analysis of its structure. *See* Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 U.C.L.A.L. REV. 293, 308-12 (1975). But a classification devised for those purposes provides no particular assistance in determining the proper allocation of the burden of persuasion. For that purpose the criteria set forth in this article should be determinative, without regard to the classification of an issue for some other purpose as part of the definition of crime or as a defense.

12. *E.g.*, State v. Millett, 273 A.2d 504 (Me. 1971) (rule unconstitutional; instruction placing burden on defendant harmless error because evidence insufficient); Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975) (rule unconstitutional); Commonwealth v. Carbonetto, 455 Pa. 93, 97, 314 A.2d 304, 306 (1974); State v. Judge, 208 S.C. 497, 507, 38 S.E.2d 715, 720 (1946); State v. Collins, 154 W. Va. 771, 777, 180 S.E.2d 54, 58 (1971); Foley v. State, 11 Wyo. 464, 482-83, 72 P. 627, 628-29 (1903).

13. *E.g.*, Roy v. Commonwealth, 500 S.W.2d 921, 922 (Ky. 1973); State v. Milam, 108 Ohio App. 254, 261, 156 N.E.2d 840, 843 (1959); DEL. CODE tit. II, § 464 (1975); TEX. PENAL CODE ANN. tit. 1, § 8.05 (Vernon 1974).

insanity,[14] entrapment,[15] renunciation,[16] and mistake.[17] They have been required to prove that their conduct falls within a specific exception written into the statutory definition of a particular crime.[18] They have been required to prove threshold matters such as the running of the statute of limitations,[19] and mental incompetence for trial.[20]

Like the reasonable doubt rule itself, some of these exemptions have relatively ancient roots.[21] Nevertheless, the conflict between the rule and the exceptions has never been adequately explained, despite periodic efforts by courts and commentators.[22]

14. *E.g.*, Leland v. Oregon, 343 U.S. 790 (1952); People v. Rodriguez, 272 Cal. App. 2d 80, 86-87, 76 Cal. Rptr. 818, 882 (1969); Rivera v. State, 351 A.2d (Del.), *appeal dismissed for want of substantial federal question*, 429 U.S. 877 (1976); Grace v. State, 231 Ga. 113, 115, 200 S.E.2d 248, 249 (1973); Phillips v. State, 86 Nev. 720, 722, 475 P.2d 671, 672 (1970), *cert. denied*, 403 U.S. 940 (1971) (holding rule not changed by *Winship*); Commonwealth v. Vogel, 440 Pa. 1, 8-9, 268 A.2d 89, 93-95 (1970).

15. *E.g.*, United States v. Braver, 450 F.2d 799, 801-02 (2d Cir. 1971); People v. Moran, 1 Cal. 3d 755, 760-61, 463 P.2d 763, 765-66, 83 Cal. Rptr. 411, 413 (1970); People v. Laietta, 30 N.Y.2d 68, 75, 281 N.E.2d 157, 161, 330 N.Y.S.2d 351, 356-57, *cert. denied*, 407 U.S. 923 (1972).

16. *E.g.*, Cowart v. State, 136 Ga. App. 528, 529-31, 221 S.E.2d 649, 650-51 (1975); N.H. REV. STAT. ANN. § 629:1 (Supp. 1973).

17. *E.g.*, N.H. REV. STAT. ANN. § 626:3 (Supp. 1973); WASH. REV. CODE ANN. § 9.79.160 (2) (Supp. 1976) (reasonable belief of age as defense to statutory rape).

18. *E.g.*, Nix v. State, 135 Ga. App. 672, 219 S.E.2d 6 (1975) (medical prescription as defense to amphetamine possession); State v. Lynch, 197 N.W.2d 186, 190-91 (Iowa 1972), *cert. denied*, 409 U.S. 1116 (1973) (same defense to narcotics possession, changed by recent statute); Commonwealth v. Davis, 359 Mass. 758, 270 N.E.2d 925 (1971) (license as defense to carrying pistol in automobile); *but see* Johnson v. Wright, 509 F.2d 828 (5th Cir.), *cert. denied*, 423 U.S. 1014 (1975) (Georgia rule requiring defendant to prove existence of license as defense to concealed weapon charge violates due process).

19. Osborn v. State, 86 Okla. Crim. 259, 268-72, 194 P.2d 176, 181-83 (1948).

20. United States *ex rel.* Johnson v. Brierley, 334 F. Supp. 661 (E.D. Pa. 1971); State v. Marks, 252 La. 277, 282-83, 211 So. 2d 261, 263 (1968), *sentence vacated on other grounds*, 408 U.S. 933 (1972); *cf.* Young v. Smith, 8 Wash. App. 276, 278, 505 P.2d 824, 825 (1973) (determination of competency "an exercise of judicial discretion").

21. One example is the rule that the defendant bears the burden of proving provocation as a defense to murder (reducing the crime to manslaughter). *See* M. FOSTER, CROWN LAW 255, 296-97 (Dublin 1767); 4 W. BLACKSTONE, COMMENTARIES *201. A 1727 English case may have established that rule. *See* The King v. Oneby, 2 Ld. Raym. 1485, 1497, 92 Eng. Rep. 465, 473 (K.B. 1727). The case was cited for that proposition in the important Massachusetts case of Commonwealth v. York, 50 Mass. (9 Met.) 93, 113-15 (1845). Recent scholarship suggests that this view of the case is incorrect, that *Oneby*, properly read, imposed on the defendant only the burden of raising the defense by the introduction of some evidence, and not the ultimate burden of proof or "risk of nonpersuasion." Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 902-907 (1968).

In the 19th century a number of English and American courts expressly imposed the burden of proof on the defendant for a range of issues in a criminal case. *See, e.g.*, M'Naghten's Case, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722-23 (H.L. 1843) (insanity defense); R. v. Smith, 8 C. & P. 160, 173 Eng. Rep. 441 (Cent. Crim. Ct. 1837) (self defense).

22. By far the best work on this problem is Fletcher, *supra* note 21, which compares Anglo-American history and practice with that of France and West Germany. Recently there has been a flurry of articles, *see e.g.*, Osenbaugh, *The Constitutionality of Affirmative Defenses to Criminal Charges*, 29 ARK. L. REV. 429 (1976); Comment, *Affirmative*

The Supreme Court has provided little guidance in the search for a coherent approach to the problem of allocating the burden of persuasion in criminal cases. In *Mullaney v. Wilbur*[23] the Court invalidated a state statute requiring the defendant to prove provocation as a defense to murder, reducing the crime to manslaughter. Two years later in *Patterson v. New York*,[24] without overruling *Mullaney*, the Court upheld a statute requiring the defendant to prove "extreme emotional disturbance" as a defense to murder, reducing the crime to manslaughter. The opinions in the two cases survey the factors that have been thought relevant by lower courts and commentators in deciding when the Constitution permits such burden-shifting, but in neither case did the Court offer a framework for analyzing the problem in future cases.[25]

The purpose of this article is to propose a coherent approach to the problem of allocating the burden of persuasion in a criminal case. First it will be necessary to consider in some detail the purposes of the reasonable doubt rule, in order to measure the propriety of an exemption against the purposes of the rule. Part II then examines one possible ground for exemption, and explores an important aspect of the relationship between rules of proof and substantive criminal law. An adjustment in the rules of proof has often seemed to offer an attractive device for tempering the force of controversial substantive law. If a legislature contemplates establishing a new and controversial defense, then proponents and opponents may seek to compromise by exempting the issue from the reasonable doubt rule. Part II examines at some length that theory of fair compromise, and ultimately rejects it as a ground for exempting issues from the reasonable doubt rule.

Defenses After Mullaney v. Wilbur: *New York's Extreme Emotional Disturbance*, 43 BROOKLYN L. REV. 171 (1971); Note, *Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant*, 64 GEO. L.J. 871 (1976); Comment, *Unburdening the Criminal Defendant:* Mullaney v. Wilbur *and the Reasonable Doubt Standard*, 11 HARV. C.R.-C.L. L. REV. 390 (1976).

23. 421 U.S. 624 (1975).

24. 97 S. Ct. 2319 (1977).

25. The Court pointed to the fact that the *Mullaney* statute defined murder in such a way that lack of provocation could be said to be part of the definition, while the *Patterson* statute defined murder without regard to lack of extreme emotional disturbance, and then separately specified that extreme emotional disturbance was a defense. If the reasonable doubt rule reached only those facts included in the legislative definition of the crime, then a state could avoid the rule entirely by specifying that it is a crime to be accused, and a defense to be innocent; short of that extreme position, the state could avoid the rule for any particular issue by labelling that issue a defense. The *Patterson* Court acknowledged that implication of its opinion, observing that "there are obviously constitutional limits beyond which the States may not go in this regard." *Id.* at 2327. The only limit mentioned by the Court is the principle that the state cannot avoid the rule entirely, by shifting to the defendant the burden on all issues. Further limits await future elucidation by the Court.

Part III considers a second possible reason for exempting issues from the reasonable doubt rule: the need to alleviate special problems of proof. The burden of persuasion has often been assigned to the defendant for an issue on the ground that he has better access to evidence, or on the ground that his claim is highly improbable. An examination of these arguments suggests that special problems of proof may on rare occasions support an exemption from the rule but that the conditions for such an exemption are seldom met.

Finally Part IV identifies the critical distinction between the issues in a criminal trial that implicate the values served by the reasonable doubt rule, and the issues that do not. A principled distinction can be drawn between the issues of fact that determine the guilt or innocence of the defendant or the wrongfulness of his conduct, on the one hand, and issues of fact that determine the admissibility of evidence or the propriety of holding a trial, on the other. Among the facts that determine guilt, however, distinctions can seldom if ever be justified in relation to the purposes of the reasonable doubt rule.

I. Reasons for the Reasonable Doubt Rule

Two distinct functions are generally attributed to the requirement that the government prove guilt beyond a reasonable doubt. First, the rule is meant to affect the outcome of individual cases, reducing the likelihood of an erroneous conviction. Second, the rule is meant to symbolize for society the great significance of a criminal conviction. The *Winship* Court invoked both purposes, reasoning that the rule was required both to protect the important interest of the accused individual in avoiding incarceration and stigma, and to command the respect and confidence of the community in the moral force of the criminal law.[26] Closer examination of these functions offers some guidance for the task of defining the proper scope of the rule.

The first function of the reasonable doubt rule is to reduce the chance of conviction in an individual case, by putting a thumb on the defendant's side of the scales of justice. It directs the factfinder to render a verdict of not guilty because the case is too close for decision, even when the evidence suggests that guilt is somewhat more likely than innocence, so long as the evidence for guilt is not overwhelming. One reason for putting a thumb on the defendant's side is to compensate for a systematic flaw in the scales. That is, factfinders may favor the prosecution rather than weigh the evidence objectively. By

26. 397 U.S. at 363-64.

tilting the scales toward the defendant, the reasonable doubt rule restores the balance and thereby enhances the overall accuracy of the decisionmaking process.[27] An exception to the rule would seem defensible if for some issue the scale is more trustworthy than usual and the corrective is therefore unnecessary.[28]

In reducing the likelihood of an erroneous conviction, the reasonable doubt rule does not, however, simply restore an accurate balance; it is also understood to introduce a deliberate imbalance, tilting the scales in favor of the defendant. It represents "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[29] This value choice may result from a straightforward determination that the costs of an erroneous conviction are greater than the costs of an erroneous acquittal. The tilt may also be intended to provide a measure of protection against the danger that prosecutors and factfinders might abuse their power and arbitrarily impose those costs selectively on unpopular defendants. In either case, the value choice calls for a rule that will reduce the chance of convicting innocent people, even if the result is to reduce the chance of convicting guilty people as well. To justify an exception to the rule, then, it is not enough to find that the scale is not biased against the defendant; an exception is appropriate only if the scale also provides any requisite bias in favor of the defendant. That can happen in either of two circumstances. For some issues, there might be something special about the scale, so that it incorporates the desired imbalance even without introducing the reasonable doubt rule.[30] For other issues there might be something special about the issue, so that the reasons requiring imbalance are not present, and errors favoring the government are seen as no more costly—or even less costly—than errors favoring the defendant.[31]

The second function of the reasonable doubt rule, its symbolic function, is to single out criminal convictions as peculiarly serious among the adjudications made by courts. The reason for doing this may be to enhance the moral force and deterrent effect of criminal sanctions. On this view, the rule increases the cost of conviction by increasing the opprobrium and stigma that accrue to those who are convicted. Of course, this possible salutary effect might well be

27. *See* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1149-53 (1960).
28. *See* Part III *infra*.
29. 397 U.S. at 372 (Harlan, J., concurring).
30. *See* Part III *infra*.
31. *See* Part IV *infra*.

dwarfed by the reduction in deterrence that results from the reduced likelihood of convicting the guilty.

Alternatively, the symbolic function of the reasonable doubt rule might be important not for its possible effect on criminal behavior, but rather for its affirmation of shared moral purpose. It may be thought valuable to make a public commitment to the principle of protecting individuals against the state's power to convict, by giving the accused in a criminal case a generous benefit of the doubt.[32] On either view of the symbolic function of the rule, it is associated with the distinctive character of criminal adjudications. With respect to the symbolic function, then, exceptions are appropriate only for issues that for some reason do not share in that distinctive character.[33]

One might well question whether the reasonable doubt rule in fact serves any of the functions invoked to support it. Unless the rule has an effect on the decision of cases, it can neither correct bias in the system nor introduce bias in favor of the defendant. Likewise, the rule would ill serve its symbolic functions if it had no effect on the decision of cases, or at least, if it were known to have no effect.

The evidence concerning the effectiveness of the rule is scant, but it at least suggests that the rule affects the outcome of cases. No published studies have compared a rule assigning the burden of persuasion to the prosecutor with one assigning the burden to the defendant. The difference between those two rules seems to be widely acknowledged.[34] It is generally agreed that factual disputes are sometimes difficult to resolve, and that a factfinder will therefore welcome, understand, and follow a rule that specifies the outcome in a close case.[35]

32. Professor Tribe has argued that these symbolic functions may also militate against quantifying the concept of proof beyond a reasonable doubt. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1374 (197➡ Tribe, *A Further Critique of Mathematical Proof*, 84 HARV. L. REV. 1810, 1818 (1971). The argument, in brief, is that any attempt at quantification, such as the claim that conviction is authorized when the factfinder is 99% convinced of guilt, necessarily quantifies some acceptable risk of error. Tribe argues that it defeats an important symbolic function of the rule to make explicit any finite acceptable risk of error, even though such a quantity may in principle exist.

33. *See* Part IV *infra*, in which a criterion is proposed for identifying issues that can properly be exempted from both the symbolic and the scale-tilting functions of the rule.

34. Typical is the observation that "[n]o lawsuit can be decided, rationally, without the application of the commonplace concept of burden of proof—the duty to persuade—or as is sometimes otherwise stated the risk of non-persuasion." McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 242 (1944). *But see* Dworkin, *Easy Cases, Bad Law, and Burdens of Proof*, 25 VAND. L. REV. 1151, 1164-67 (1972) (burden of persuasion almost never aid to decisionmaking).

35. Except insofar as there is reason to doubt whether jurors understand or follow any instructions. For a report of a study in which 116 jurors all heard an instruction

More controversy has developed over the practical effect of requiring the prosecutor to prove guilt beyond a reasonable doubt, rather than by a preponderance of evidence. Judge Learned Hand was skeptical about the difference between evidence which merely preponderates and evidence which excludes all reasonable doubt. Conceding that a criminal defendant had a right to an instruction declaring the stricter standard, he nevertheless denied that an appellate court, in reviewing the sufficiency of evidence, could or should

> distinguish between the evidence which should satisfy reasonable men and the evidence which should satisfy reasonable men beyond a reasonable doubt. While at times it may be practicable to deal with these as separate without unreal refinements, in the long run the line between them is too thin for day to day use.[36]

Judge Hand may simply have been expressing doubts about the ability of an appellate court to make the necessary distinction on a written record, but his language suggests that he also doubted the ability of anyone to make so subtle a distinction.[37]

Two attempts have been made to study empirically the effect on the factfinder of varying the instruction on the weight of the burden. The results of both studies are inconclusive, but they suggest that the instruction can affect the outcome of a case. In one study, the Jury Project at the London School of Economics conducted the same mock trial of a rape case before many juries, varying only the instruction on the burden of persuasion.[38] One set of juries heard this instruction on reasonable doubt, similar to instructions commonly used in this country: "[Before you convict] you should be sure beyond reasonable doubt and by reasonable doubt I mean not a fanciful doubt that you might use to avoid an unpleasant decision, but a doubt for which reasons can be given."[39] Another set of juries heard an instruction that

requiring the government to prove guilt beyond a reasonable doubt, and nevertheless 2% maintained the belief that the defendant had the burden of proving innocence, see Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976).

36. United States v. Feinberg, 140 F.2d 592, 594 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944), *overruled*, United States v. Taylor, 464 F.2d 240 (2d Cir. 1972).

37. By contrast, the trial judge in *Winship* seems to have found the difference clear enough. Framing the issue perfectly for appellate review, he found and put on the record that the evidence of larceny in the case before him was convincing, but not convincing beyond a reasonable doubt. 397 U.S. at 360 & n.2. *See also* United States v. Freeman, 498 F.2d 569, 576 (2d Cir. 1974).

38. This study is reported in L.S.E. Jury Project, *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208. *See also* Sealy & Cornish, *Jurors and Their Verdicts*, 36 MODERN L. REV. 496 (1973) (reporting on effects of age, sex, and other characteristics of jurors).

39. L.S.E. Jury Project, *supra* note 38, at 213. Compare the pertinent part of the pattern instruction on the burden of persuasion for federal criminal trials: "A reasonable

is reportedly given with increasing frequency in England instead of the instruction on reasonable doubt: "Before you convict you must feel sure and certain on the evidence you have heard that the accused is guilty."[40] A third set of juries heard an instruction on preponderance of evidence, similar to instructions commonly used in civil cases in this country: "[B]efore you convict you must feel satisfied that it is more likely than not that the accused is guilty.[41]

The conviction rate was highest for the preponderance instruction, slightly lower for the reasonable doubt instruction, and much lower for the "sure and certain" instruction.[42] That result suggests that jurors can distinguish between at least two levels of certainty, though it also suggests that the standard instruction on reasonable doubt may not adequately elicit that capacity from them.[43]

The effect of instructions to juries has also been studied by Rita

doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act." 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 11.14 (3d ed. 1977).

40. L.S.E. Jury Project, *supra* note 38, at 213. For recent English cases approving this instruction, see R. v. Holland, 118 NEW L.J. 1004 (C.A. 1968); R. v. Allan, [1969] 1 All E.R. 91 (C.A.). One commentary on the *Allan* case notes:

> The expression "beyond reasonable doubt," is the traditional description of the standard required of the Crown, and the judge is still "on safe ground" if he uses that expression: *Hepworth and Fearnley* [1955] Q.B. 600; but it now seems more fashionable to direct the jury that they must "feel sure" of the prisoner's guilt [directing attention to *R. v. Holland*].

1969 CRIM. L. REV. 49, 49.

41. L.S.E. Jury Project, *supra* note 38, at 214. Compare the pertinent part of the pattern instruction on the burden of persuasion in federal civil trials: "To 'establish by a preponderance of the evidence' means to prove that something is more likely so than not so." 2 E. DEVITT & C. BLACKMAR, *supra* note 39, § 71.14.

42. Twenty-two juries heard the case, which involved charges against two defendants. The evidence of rape was strong in the case of one defendant, and weak in the case of the other. Results were tabulated for 257 individual jurors, rather than for jury panels. Forty-four jurors heard the instruction on preponderance, of whom 30 (or 68%) convicted the first defendant and 18 (41%) convicted the second. One hundred and forty-two jurors heard the reasonable doubt instruction, of whom 94 (66%) convicted the first and 46 (32%) convicted the second. And 71 heard the sure and certain instruction, of whom 39 (55%) convicted the first and 13 (18%) convicted the second. L.S.E. Jury Project, *supra* note 38, at 216-17.

43. Similar results were obtained on repeated trials of a theft case. The same procedure was followed, except that a slightly different version of the reasonable doubt instruction was used: "[Y]ou should be sure beyond reasonable doubt and by a reasonable doubt I mean not a fanciful doubt, but such a doubt that might affect you in daily business or domestic decisions." *Id.* at 213. This time the conviction rate was once again much lower for "sure and certain" than for the preponderance instruction ($32/90 = 35\%$ as compared with $42/92 = 46\%$). *Id.* at 216. But the reasonable doubt instruction produced a similarly low conviction rate, slightly lower in fact than "sure and certain" ($43/137 = 31\%$). (Although the results in the theft case show a trend in the same direction as that in the rape case, the authors caution that the differences in conviction rates in the theft case were not great enough to be statistically significant. *Id.* at 219.)

James Simon, formerly associated with the Chicago Jury Project.[44] Relying upon questionnaires rather than mock trials, she asked a sample of sitting judges to translate into probability statements their sense of what it means to be convinced by a preponderance of the evidence, and to be convinced beyond a reasonable doubt.[45] When responding to questionnaires, at least,[46] the judges thought there was an important difference: almost a third of the responding judges put "beyond a reasonable doubt" at 100%, another third put it at 90% or 95%, and most of the rest put it at 80% or 85%. For the preponderance standard, by contrast, over half put it at 55%, and most of the rest put it between 60% and 75%. Questionnaires sent to jurors and students produced slightly lower results for the reasonable doubt instruction, and rather higher results for the preponderance standard; still, for most people the distinction was clear.[47]

There is some evidence, then, that factfinders can distinguish among degrees of belief, and that rules about the burden of persuasion affect the outcome of cases. It is at least plausible, therefore, that the requirement of proof beyond a reasonable doubt serves the purposes attributed to it.

44. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY vii (1966).

45. *See* Simon, *Judges' Translations of Burdens of Proof into Statements of Probability*, [1969] TRIAL LAW. GUIDE 103.

46. The judges may have been stating what they thought was correct legal doctrine, rather than describing what they would do as judges.

47. *See* Simon & Mahan, *Quantifying Burdens of Proof*, 5 LAW & SOC'Y REV. 319 (1971). For the preponderance of the evidence standard the jurors and students produced a mean value of 75%, compared with the judges' 55%. *Id.* at 325.

In another experiment, Simon presented a mock trial of a homicide to many student juries; half were asked for a verdict on a reasonable doubt instruction, and half were asked for a numerical estimate of the probability of guilt. By comparing her two groups, she inferred that jurors were voting to convict when they thought the probability of guilt as low as 74%. Simon, *"Beyond a Reasonable Doubt"—An Experimental Attempt at Quantification*, 6 J. APPLIED BEHAVIORAL SCI. 203, 207 (1970). This figure, interestingly, is about equal to the probability of guilt the students put down on their questionnaires as the measure of the preponderance standard. Simon & Mahan, *supra*. Here too, of course, the results are inconclusive, but the study suggests that despite Judge Hand, judges may be able to make the distinction between the two standards of proof; it also suggests that juries do it less well, at least under the instructions that are most frequently given. *Cf.* Simon, *supra* at 207-08 (questioning "meaningfulness" of reasonable doubt instruction in its present form).

While it appears that a fact finder can in general make distinctions concerning the burden of persuasion, that ability may diminish if he is asked to apply several different rules to different issues in the same case. If multiple rules generate confusion, that would suggest not that the rules make no difference but that a single rule should govern all issues in a case. The reported studies do not address this possible source of confusion.

II. An Exception for a Gratuitous Defense?

The reasonable doubt rule speaks only to the procedures for proving facts, and not to the substantive law that determines what facts must be proved. The Constitution imposes very few restraints on the substantive conditions for criminal responsibility, leaving the field largely open to the policy choices of legislatures. Some commentators have thought it anomalous that the Constitution should be read to impose rigid requirements on the process of proof while remaining nearly indifferent to the substance of what must be proved.[48] Increasingly it is argued that legislative power over substance must entail power over procedure as well.[49] Those who make this argument admit that if a fact is a prerequisite to a constitutionally valid conviction, then that fact must be proved by the government beyond a reasonable doubt. Yet, they continue, if the legislature has the power to make a fact irrelevant to guilt, then the legislature must also have the power to choose its own rules for proving that fact. In particular, when the law provides a defense that turns on proof of such a fact, that defense may

48. *See, e.g.*, Allen, Mullaney v. Wilbur, *the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269, 283-85 (1977); Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919, 936-37.

49. It is no longer supposed, if it ever was, that procedural rules are neutral with respect to substantive rights; all procedural rules have some impact on substantive rights, and the impact may be more or less central to the purpose of the rule. From the perception of the relationship between substance and procedure, it may seem a small step to argue that there is no distinction at all, and that power to regulate substantive law necessarily entails power to regulate the associated procedures. *See* Grey, *Procedural Fairness and Substantive Rights*, in DUE PROCESS 182 (NOMOS XVIII; J. Pennock & J. Chapman eds. 1977). But that step is not logically compelled, and this article suggests some reasons to resist it, based on arguments of policy and a fair reading of the constitutional requirement of due process. For an exploration of limitations, constitutional and otherwise, on the uses of procedure to achieve substantive ends in civil litigation, ➞ Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975).

Although the distinction between substance and procedure has often proved troublesome, the vast literature on the subject generally agrees on the core of the distinction: a procedural rule is centrally concerned with the management of litigation, and a substantive rule is centrally concerned with "people's conduct at the stage of primary private activity." H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 678 (1953). Many rules have both concerns, as a matter of rulemaker's intent or operative effect. Such rules can only be classified in light of the purpose for which the classification is made. ➞ Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333 (1933), *reprinted in* W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 154 (1942) (with addendum at 183-9 ➞ Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724-27 (1974). Despite its ambiguities, the distinction has seemed useful for many purposes. Prominent among them is the constitutional decision to regulate "process" more stringently than substantive law.

be characterized as gratuitous, and therefore exempt from the requirement of proof by the government beyond a reasonable doubt.[50]

This analysis seems particularly attractive in its first aspect, concerning the proof of a fact that is constitutionally required as a basis for criminal conviction. For such a fact, at least, the legislature cannot relax the rules of proof, because it would thereby accomplish (or ap-

50. The argument that gratuitous defenses are not governed by the constitutional proof rules that ordinarily govern a criminal trial is analogous to the argument that certain interests, called privileges, are not subject to the constitutional proof rules that govern a civil proceeding to take property or liberty. The Constitution plainly imposes a requirement of due process on such a proceeding, and that has long been understood to entail notice and some form of hearing. *E.g.*, Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117 (1926); Londoner v. City of Denver, 210 U.S. 373 (1908). But some interests, gratuitously conferred by the state, have been denominated privileges rather than rights, and for that reason have been exempt from the requirements of fair fact-finding. *E.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (alien's admission to U.S. a "privilege"; hearing not required if alien denied entry to U.S.).

The right-privilege distinction seemed for a time to be waning in importance, *see* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). Indeed, it was apparently rejected in Arnett v. Kennedy, 416 U.S. 134 (1974), when six Justices took the position that a federal employee was constitutionally entitled to a hearing before his employment could be terminated for cause. The six agreed that though Congress could eliminate entirely the right to retain a job unless there was "good cause" for dismissal, it could not grant that right and then undermine it by denying a hearing on the issue of good cause. "While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Id.* at 167 (Powell, J., concurring, joined by Blackmun, J.) (footnote omitted). The same view was expressed by Justice White in concurrence, *id.* at 177-86, and by Justice Marshall in dissent, joined by Justices Douglas and Brennan, *id.* at 210-11. The six divided over the question whether the requirement was satisfied by the rudimentary hearing provided by the statute. Only three Justices thought it was within the power of Congress "to enact what was essentially a legislative compromise" granting substantive rights with procedural obstacles. *Id.* at 153-54 (Rehnquist, J., announcing judgment of Court, joined by Burger, C.J., and Stewart, J.).

Some doubt has been cast on the *Arnett* principle by the subsequent decision in Bishop v. Wood, 426 U.S. 341 (1976), holding that a state employee was not constitutionally entitled to a hearing before his employment could be terminated for cause. Perhaps *Bishop* is best understood as a case of extraordinary judicial deference, rising to constitutional principle, when the relationship between a state and its employee is at stake. *See id.* at 349-50 n.14; *cf.* National League of Cities v. Usery, 426 U.S. 833 (1976) (federal minimum wage and maximum hour regulations as applied to state and municipal employees beyond power under commerce clause and violative of Tenth Amendment). Alternatively, *Bishop* may turn on a dubious narrow reading of the underlying state right, apart from the state-specified procedures. *See* Codd v. Velger, 97 S. Ct. 882, 883-84 (1977). These public employment cases have provoked considerable commentary on the relationship between procedural rights and substantive rights (or privileges). *See, e.g.*, Grey, *supra* note 49; Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS 182 (NOMOS XVIII; J. Pennock & J. Chapman eds. 1977); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977); Van Alstyne, *Cracks In "The New Property": Adjudicative Due Process in The Administrative State*, *id.* at 4 ➡ Note, *Statutory Entitlement and the Concept of Property*, 86 YALE L.J. 695 (1977).

The issues need not be resolved the same way in this context as in the criminal context, where different values are at stake, but the similarity of argument is striking.

proach) the prohibited result of removing the fact from significance in the case. The Supreme Court adopted this line of reasoning in *Bailey v. Alabama*,[51] which concerned a conviction for the crime of entering a contract for the performance of services with intent to defraud. The statute defining the crime further provided that intent to defraud could be rebuttably presumed from proof of failure to perform.[52] The Court said that the statute would be unconstitutional under the Thirteenth Amendment and the federal laws against peonage if it punished a mere breach of contract for services, without requiring a finding of fraudulent intent.[53] Moreover, because the legislature had no power to make the fact of fraudulent intent irrelevant to criminal liability, the Court held that the legislature also had no power to relax the rules for proving that fact.[54] Instead of using a rebuttable presumption of intent, the legislature could have reached the same result by labelling lack of fraudulent intent an affirmative defense, with the burden of persuasion on the defendant.[55] The reasoning that invalidated the *Bailey* presumption should also invalidate such an evasion of the reasonable doubt rule.[56]

But of course to say that stringent rules of proof clearly apply when a fact is of constitutional significance is not to say they apply only in that case. It remains to consider whether, and to what extent, the Constitution regulates the factfinding process when it does not specify the facts to be found. The theory of gratuitous defenses would hold that it does not, that the reasonable doubt rule should apply only to the proof of facts that are constitutionally necessary for liability or guilt. According to this theory, any other fact may be seen as establish-

51. 219 U.S. 219, 239, 244-45 (1911).

52. *See id.* at 227-28.

53. *Id.* at 240-45.

54. *Id.* at 244-45. Essentially the same issues were analyzed in the same manner in Taylor v. Georgia, 315 U.S. 25 (1942).

55. It is difficult to determine exactly what form was taken by the *Bailey* presumption. The strongest form of rebuttable presumption operates exactly like a rule putting the burden of persuasion on the party who contests it. *See* Ashford & Risinger, *supra* note 2, at 194-96. If the *Bailey* presumption was weaker in effect, and it was nonetheless unconstitutional, then a fortiori a burden-shifting rule would also be unconstitutional.

56. The Supreme Court has indicated that there is a constitutionally significant difference between devices labelled "rebuttable presumptions" and devices labelled "affirmative defenses", even when their effect is identical. In Patterson v. New York, 97 S. Ct. 2319 (1977), the Court distinguished Mullaney v. Wilbur, 421 U.S. 626 (1975), on the ground that *Mullaney* involved a presumption which was unconstitutional, while *Patterson* involved an affirmative defense which was permissible. *See* p. 1305 & n.25 *supra*. The reason for making such a distinction is not elucidated, and perhaps cannot be. Neither case, however, dealt with a defense that is constitutionally required. *See* pp. 1327-29 *infra*. Accordingly it remains open to conclude that the two devices are sufficiently similar to require the same treatment when they operate to relax the rules for proving a fact that is constitutionally required as a basis for conviction.

ing a defense that is gratuitous, *i.e.*, subject to complete elimination, and therefore also subject to the partial elimination that results from relaxing the rules of proof.

This argument is most often advanced in connection with a novel or controversial defense. In such a case, the creation of a new defense with modified proof rules may be seen as a compromise between those who would grant the defense wholeheartedly, and those who would not grant it at all.[57] At least one example occurs in the Model Penal Code. The drafters proposed to establish a new defense of reasonable reliance on official advice.[58] They also proposed to make this issue one of only five in the whole Code for which the defendant is assigned the burden of persuasion.[59] The purpose of shifting the burden was at least in part to mitigate the force of the controversial defense and thereby to make it more acceptable to opponents.[60] A controversy over the proper scope of the substantive criminal law was resolved by means of a procedural compromise.

Examples abound in the penal codes of the states. In 1967 New York established a new defense to the charge of felony-murder. Under the new law, a person cannot be convicted of felony-murder if he did not personally kill, was not armed, and had no reasonable ground to believe his co-felons were armed or likely to engage in physically dangerous conduct.[61] The New York Code also provides that the defendant must prove the facts relevant to this defense by a preponderance of evidence.[62]

The New York Court of Appeals confronted a challenge to the rules of proof for that defense in *People v. Bornholdt*.[63] The defendant argued that the new defense operates to redefine the crime of felony-murder, and that he was entitled to proof excluding that defense beyond a reasonable doubt. The court upheld the statute, in

57. *See* 1 WORKING PAPERS OF THE NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS 17-19 (1970); Agata, *Criminal Law*, 27 SYRACUSE L. REV. 47, 58 (1976) (1975 Survey of New York Law); Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 548 n.92 (1973); Fletcher, *supra* note 21, at 928-29.

58. MODEL PENAL CODE § 2.04(3)(b), (4).

59. The other four are: entrapment, *id.* § 2.13(2); in a prosecution for theft, the value of the stolen property, reducing the grade of the crime, *id.* § 223.1(2)(b); in a prosecution for deceptive business practices, lack of knowledge, *id.* § 224.7; in a prosecution of a corporation, diligent efforts of the manager to prevent offense, *id.* § 2.07(5).

60. *Id.* § 1.13, Comment (Tent. Draft No. 4, 1955); *cf.* A.L.I. Proceedings of the 32d Annual Meeting 171 (1955) (unpublished).

61. N.Y. PENAL LAW § 125.25(3) (McKinney 1975).

62. *Id.* § 25.00(2).

63. 33 N.Y.2d 75, 305 N.E.2d 461, 350 N.Y.S.2d 369 (1973), *cert. denied sub nom.* Victory v. New York, 416 U.S. 905 (1974).

part on the ground that the defense was new, not constitutionally required, and hence not subject to the reasonable doubt rule. On the fair compromise theory, then, the power to withhold a defense includes the power to grant it grudgingly.

This position was further elaborated by the New York Court of Appeals in a case concerning another new defense to a charge of murder, the defense of extreme emotional disturbance.[64] In *People v. Patterson*,[65] the New York court again rejected a challenge to the requirement that the defendant prove the facts relevant to his defense by a preponderance of evidence. Although several grounds were invoked for the decision, a concurring opinion by Chief Judge Breitel gave special emphasis to the novel and controversial character of the defense, observing that "only those with a lack of historical perspective would treat the affirmative defense as a hardening of attitudes in law enforcement rather than as a civilized and sophisticated amelioration."[66] He reasoned that the legislature had the power to eliminate the defense; they might well do so if required to subject it to rigid proof rules; hence the court should recognize a power in the legislature to modify the rules of proof. In affirming the judgment, the Supreme Court quoted this argument approvingly, though without invoking it as a ground for decision.[67]

The argument has some appeal, but it is seriously flawed in several respects. First, both the text and the general pattern of constitutional regulation point strongly to the contrary view, that the Constitution regulates the factfinding process even when it does not specify the facts to be found. Second, the device of adjusting rules of proof is an inappropriate method of resolving controversy over the proper reach of the substantive criminal law. Third, the device tends to make the substantive commands of the criminal law obscure, and therefore more difficult to obey. Finally, even if none of the above were true, the

64. N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1975).

65. 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976), *aff'd sub nom.* Patterson v. New York, 97 S. Ct. 2319 (1977).

66. *Id.* at 306, 347 N.E.2d at 910, 383 N.Y.S.2d at 584 (concurring opinion of Breitel, C.J., necessary for disposition). As originally proposed by a state law reform commission, the defense did not carry any assignment of the burden of persuasion to the defendant. That modification was made between initial formulation and enactment. STATE OF NEW YORK TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, FOURTH INTERIM REPORT 36 (1965); *see* People v. Patterson, 39 N.Y.2d at 301, 347 N.E.2d at 906, 383 N.Y.S.2d at 581. The available history of the defense thus suggests, though it does not compel, the conclusion that the change in rules of proof was necessary to secure enactment. *See* Comment, *Affirmative Defenses after* Mullaney v. Wilbur: *New York's Extreme Emotional Disturbance*, 43 BROOKLYN L. REV. 171, 183 n.62 (1976).

67. 97 S. Ct. 2319, 2328 n.13 (1977).

argument for special treatment of gratuitous defenses would be subject to serious question on the ground that it is exceedingly difficult to keep within tolerable bounds. This section will consider each of these matters in turn.

A. *Constitutional Text and Pattern*

The Constitution contains many provisions regulating trial procedure, and very few regulating the substance of criminal law. It specifies, *inter alia*, that criminal charges shall be tried by jury, with counsel, confrontation of adverse witnesses, and compulsory process for obtaining defense witnesses; that the accused must be informed of the nature of the charges and that he shall not be deprived of life, liberty, or property without due process of law.[68] These procedural requirements apply to the trial of any crime, no matter how defined. That approach, far from being anomalous, represents a sensible adjustment between the desire on the one hand to give the political organs of government wide scope for making judgments about wise social policy, and on the other hand to restrain their power in order to protect individuals against injustice.

The Framers were well aware that they could maximize protection against arbitrary criminal prosecutions by regulating the substance of criminal law as well as its procedure. With respect to treason prosecutions, which they perceived as a great threat to liberty, they did exactly that. The Constitution expressly states the definition of treason, as well as the method by which it may be proved.[69] But with respect to prosecutions for other crimes, which seemed to pose a lesser threat, the primary source of constitutional protection is the regulation of procedure.[70]

The Constitution's relative lack of substantive restraints leaves a legislature free, within extremely broad limits, to choose its criteria for criminal conviction and punishment. It may establish a defense or withhold it, specify precise grades of crime or create broad categories with a wide range of possible sentences. But the structure and pattern of constitutional regulation suggest that having made a substantive

68. U.S. CONST. art. III, § 2, cl. 3 (jury and venue); *id.* amend. V (indictment, due process); *id.* amend. VI (speedy public trial, jury, notice, confrontation, compulsory process, counsel); *id.* amend. XIV § 1 (due process).

69. *Id.* art. III, § 3, cl. 1.

70. *See* 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 163-64 (speech of James Wilson in Pa. Convention); *id.* at 309 (speech of Edmund Randolph in Va. Convention).

choice, a legislature cannot then undermine that substantive choice with procedural manipulations.

It is possible, of course, that enforcing rigorous procedural requirements may increase rather than decrease the total quantity of injustice in the world. If a legislature is uncertain whether to create a new defense, and it is barred from the method of procedural compromise, then it may abandon the proposal. Similarly, if a legislature is considering a refined grading scheme, or a set of criteria for sentencing, and it is obliged to surround any new substantive rights with elaborate procedural safeguards, then it might prefer to leave the substantive law unchanged. Legislators need not see their choices as so limited. But even if they did, a Constitution designed to promote both fair procedures and fair substance might sensibly focus primarily on fair procedures, and rely on the political process to remedy substantive unfairness. For substantive injustice is more likely than procedural injustice to attract the attention of the political organs and to provoke a response.[71]

A single example cannot prove the point, but perhaps it can make it more plausible. The Iowa legislature decided that it was inappropriate to punish as a dealer a person who transferred narcotics as an accommodation, without intent to profit or to induce addiction. A statute provided that such a person should be punished as a minor offender, like a possessor, rather than as a felon.[72] But the law also provided that the defendant must prove the accommodation defense by clear and convincing evidence. The result of that procedural arrangement was, of course, to make the defense relatively inaccessible; some people who in fact made accommodation sales were probably punished as dealers. But that result was masked, and any public

71. The argument that substantive matters are especially suited for political determination is the other side of the coin from the familiar argument that procedural matters, because of their technical nature, are especially suited to judicial determination. *See, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting): "Insofar as [procedural due process] is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law." Justice Frankfurter frequently proclaimed the wisdom of a constitutional scheme that required judicial deference to the political branches on substantive matters, and judicial control of procedural matters, whether through the enforcement of constitutional requirements or through the exercise of the supervisory power over lower federal courts. *See, e.g.*, Malinski v. New York, 324 U.S. 401, 414 (1945) (separate opinion) ("The history of American freedom is, in no small measure, the history of procedure."); McNabb v. United States, 318 U.S. 332, 347 (1943) ("The history of liberty has largely been the history of observance of procedural safeguards.")

72. IOWA CODE ANN., § 204.410 (West Supp. 1977). This provision was among the many additions and modifications made by the Iowa legislature when it adopted the Uniform Controlled Substances Act in 1971.

response with it, by the procedural arrangement. A few years after the statute was passed, the state supreme court declared the burden-of-proof rule unconstitutional, on the ground that it denied the defendant his right to proof beyond a reasonable doubt.[73] Barred from the method of procedural compromise, the legislature might then have decided to eliminate the defense altogether. It did not do so. Instead it retained the defense and adopted the judicially imposed requirement of proof by the government beyond a reasonable doubt.[74] Perhaps it was politically less acceptable to eliminate the defense explicitly, by a highly visible legislative decision about the proper treatment of people who make accommodation sales, than to burden the defense by a technical rule of procedure that might invisibly accomplish the same result.

In this respect, the constitutional requirement of procedural regularity is similar in strategy to the constitutional requirement of equal protection of the laws. The requirement of equal protection does not ensure the wisdom or fairness of substantive law. A denial of equal protection can be remedied by treating everyone equally badly, or by treating everyone equally well. A legislature that is ambivalent about extending a substantive right might choose to compromise by extending it to part of the population. Because the requirement of equal protection at least sometimes prevents that sort of compromise,[75] it might push a legislature to abandon a wise policy rather than extend it equally to everyone. For this reason the wisdom of requiring equality, like the wisdom of requiring procedural uniformity, might well be questioned.

It seems clear, however, that the strategy of the equal protection clause was to impose a requirement of equality, despite that possible outcome. One ground for that choice may be the judgment that the bare fact of inequality is a greater evil than any other likely evil. Another ground for the choice may be the judgment that a requirement of equality tends to make serious substantive evils unlikely, without foreclosing legislative options. Under a requirement of equality, a legislature that would inflict a harm on one group must be prepared to do so to others similarly situated. Barred from certain

73. State v. Monroe, 236 N.W.2d 24 (Iowa 1975), *overruling* State v. Victor, 208 N.W.2d 894 (Iowa 1973).

74. Iowa Code Ann. § 204.410 (West Special Pamphlet 1977).

75. Some compromises of precisely this sort are upheld on the ground that a legislature is entitled to proceed "one step at a time." *E.g.*, Schilb v. Kuebel, 404 U.S. 357, 364 (1971); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969). The tension between this rationale and the requirement of equal protection is noted in P. Brest, Processes of Constitutional Decisionmaking 558-65 (1975).

kinds of compromise, a legislature must choose substantive policies for their effect on a whole constituency.

Similarly, the Constitution imposes rules to govern the process of factfinding, despite the possibility that the rules might inhibit a legislature from making wise substantive decisions about what facts must be found. Iowa must decide whether it wishes to treat the accommodation seller differently from the dealer. It cannot compromise by selecting a few accommodation sellers for favored treatment. The equal protection clause prevents a compromise that would extend the defense only to white accommodation sellers, or to every fifth person who raises the defense. Similarly, the requirement of proof beyond a reasonable doubt prevents a compromise that would extend the defense only to those accommodation sellers who are identified by a rule for factfinding less rigorous than the rule that generally governs factfinding in a criminal case.

It is consistent with the general pattern of constitutional regulation, then, to conclude that the reasonable doubt rule applies to the proof of facts that establish gratuitous defenses, as well as to facts that establish substantive constitutional rights. In this respect as in others, the Constitution allocates broad discretion to the political branches in substantive matters, where their competence is greatest, and limits their decisions largely in a nonsubstantive manner. These limits on compromise are designed to promote full and fair political resolution of the substantive issues. This form of regulation is a characteristic feature of our constitutional structure, and not an anomaly that ought to give rise to exceptions to the constitutional rules.

B. *An Inappropriate Form of Compromise*

Broad application of the requirement of proof beyond a reasonable doubt operates to foreclose certain kinds of compromise in the formulation of criminal law policy. In general, compromise is a desirable and indeed essential part of the lawmaking process. If this reading of the constitutional requirement seemed to foreclose sensible legislative options for no good reason, that would count heavily for a different and more felicitous reading. But the kind of compromise prohibited by the reasonable doubt rule is less satisfactory than other forms of compromise that remain available, and therefore its loss is no ground for concern.

A change in rules of proof may sometimes be suitable as a response to concerns about difficulties of proof or access to evidence. That

possibility will be considered below.[76] But the circumstance that the defense may be characterized as gratuitous does not aid in resolving arguments about the proper rules of proof. The gratuitous character of a defense has the effect of leaving room for substantive disagreements about its worth. But it remains to consider what sort of compromise is best suited to resolve those disagreements. One form of compromise would create the defense and qualify it by relaxing or removing the government's burden of persuasion. An alternative form of compromise would take an intermediate stand on the substantive question of prohibited conduct, finding some narrow definition for the new defense. Either a substantive compromise or one that alters the rule of proof has the effect of reducing the number of people for whom the defense results in acquittal. But the substantive compromise has the advantage of being more accessible than a rule of proof to the public and to legislators and hence more likely to receive continuing scrutiny. And it has the further advantage of preserving the values served by the reasonable doubt rule.

An example may clarify the argument. Suppose that a legislature has decided to prohibit the possession of certain narcotic drugs. Suppose further that there is a controversy over a proposal to exempt from punishment those who possess narcotics solely for their personal use. Proponents and opponents of the defense might well seek an intermediate position that would recognize a defense for some, but not all, of those who possess for personal use. One possibility for substantive compromise would be to exempt from punishment only those who possess specified small quantities for personal use. Another possibility would be to exempt only those who possess for personal use in the privacy of their homes. Each of these compromises, by redefining the prohibited conduct, seeks to accommodate differing views about the harm caused, or the harm threatened, or the culpability of the actor in various situations. This substantive compromise attempts to limit the defense to those who are least culpable, or least harmful, or otherwise least suitable for criminal sanctions in the view of opponents of the defense, and at the same time most centrally deserving of the defense in the view of its proponents.[77]

76. *See* Part III *infra*.

77. A compromise that takes the form of redefining the crime may of course be motivated by evidentiary considerations. In each of the examples in text, the group might be singled out for the defense precisely because their claim of possession for personal use is thought most likely to be true. Nevertheless, if the compromise is forced into the form of an intermediate position on substantive liability, then it avoids two of the principal targets of the reasonable doubt rule: the opportunity for arbitrariness in the decision of individual cases by prosecutor or factfinder, and the low visibility of a compromise framed in procedural terms.

A substantive disagreement about whether to recognize a defense amounts to a disagreement about whether the person with the proposed defense is less suitable than other offenders for specified criminal sanctions. By shifting the burden of persuasion to the defendant, a legislature limits the defense to those for whom the evidence is most abundant. That group, however, is not necessarily the least culpable, least harmful, or least deterrable. For there is no reason to think that the continuum of culpability, harm, or deterrability bears any relationship to the continuum of available evidence. The person for whom the evidence is strongest may not be the person whose claim, if believed, has the strongest relationship to the policies behind the defense. A disagreement about the proper scope of the substantive criminal law can be compromised by an intermediate definition of the facts that constitute crimes and defenses. Tinkering with the reasonable doubt rule, which determines when to believe a defendant's version of the facts, requires an explanation in terms of the purposes of that rule. But those purposes are no less relevant to factfinding when a controversial gratuitous defense is at issue than they are to the determination of any other fact in a criminal case. Indeed, any controversy over the defense may enhance the threat to the values the reasonable doubt rule was designed to protect.

If the rule is seen as a corrective to the danger of pervasive bias on the part of the factfinder against criminal defendants, then the danger of that bias may be especially acute in the case of a defendant claiming the protection of a controversial defense. The rule may also be seen as a deliberate introduction of bias in favor of criminal defendants, reflecting a general judgment about the relative costs of errors and protecting individual defendants against arbitrary or discriminatory use of the government's prosecutorial power. A legislature uncertain about the merits of a proposed defense might reasonably wish to change its assessment of the relative costs of errors. But a constitutional valuation of the relative costs of errors cannot be avoided by legislative fiat. So long as the factual determination has the function and consequences that characterize other issues in a criminal case, such as enhanced stigma and an increased period of potential incarceration, the reasons for the constitutional rule remain. The costs of erroneous convictions and erroneous acquittals are not different by virtue of the gratuitous character of the defense. Moreover, the danger that those costs will be imposed arbitrarily against selected unpopular defendants may be especially acute in the case of a controversial defense.

Finally, the rule may be seen as serving various symbolic functions

that require its application to those aspects of a case that are distinctively criminal in character. As in the case of the error calculus, neither the gratuitous character of a defense nor its controversial character can rid it of significance if it marks a distinction with the function and consequences of other issues in a criminal case. None of the purposes of the reasonable doubt rule is affected by the gratuitous character of a defense, or by a controversy over policy that provides the impetus for compromise. An exception designed solely for the purpose of compromise would subvert the policies of the rule, without accomplishing an appropriate compromise of substantive disagreements.[78]

C. *Truth-in-Labeling*

A third reason for insisting that the gratuitous character of a defense is no ground for exempting it from constitutional rules of proof has already been suggested by the earlier discussion. Although popular understanding of the substantive law is notoriously deficient, rules about proof at trial are even less accessible to popular understanding than rules about conduct in society. One consequence of that fact is that it is somewhat more reasonable in the case of substantive law than in the case of rules of proof to rely on political processes to evaluate and revise the law. Another consequence is that unusual rules of proof, even more than unusual substantive laws, are likely to trap an unsuspecting public into reliance on a false idea of the law.

78. An interesting variation on the compromise theme appears in State v. Shoffner, 31 Wis. 2d 412, 425-27, 143 N.W.2d 458, 464-65 (1966). By statute the reasonable doubt rule governs the insanity defense in Wisconsin, and the defense is defined in relatively narrow terms. *Shoffner* held that a defendant could elect instead a broader definition of the defense, if he would agree to a rule assigning him the burden of persuasion. Thus the state offers a compromise to each individual defendant, rather than making a single compromise of general application.

From a systemic point of view, this arrangement suffers the same infirmities as a generally applicable compromise in the form of modified proof rules. The defendant's election does not reduce the risk of bias, the costs of errors, or the symbolic importance of proof rules; nor does it enhance the public visibility of the compromise. The reasons for rejecting a legislative compromise in the form of a modified proof rule ought to count against this sort of compromise as well.

Because this compromise is brought about by the defendant's election, however, the Wisconsin court was able to treat it as a waiver of rights by defendant, and therefore valid, rather than as a rule of proof imposed by the state, and therefore invalid. Seen as a waiver, the Wisconsin arrangement may seem no more problematic a form of compromise than a negotiated guilty plea. But the Court has found reason to distinguish between the waiver of all trial rights by guilty plea, and the attempt to waive some such rights while proceeding to trial. In the latter case, waiver may be foreclosed by institutional interests in the integrity of the factfinding process. *See* Singer v. United States, 380 U.S. 24 (1965) (upholding limits on waiver of jury trial). Similar considerations should bar the Wisconsin arrangement.

The criminal law is meant to operate as a guide to conduct, announcing serious penalties for certain acts, announcing minor penalties for other acts, and offering people the opportunity to avoid sanctions altogether by avoiding prohibited conduct. Suppose that a state makes possession of more than one ounce of marijuana a major crime, possession of less than an ounce a minor crime, and presence in a house containing marijuana no crime at all. With that understanding of the law, a person might reasonably choose to engage in the innocent conduct of associating with marijuana smokers, and he might further choose to engage in the minor crime of small-scale possession. But depending on the rules of proof, either choice might be riskier than it seems. If the defendant has the burden of persuasion on the issue of quantity, for example, then he runs a substantial risk of conviction for a major crime by engaging in the minor crime of small-scale possession. Likewise, if presence in a house containing marijuana raises a presumption of possession, and the defendant has the burden of persuasion on that issue, then he runs a substantial risk of conviction for possession by engaging in the noncriminal conduct of associating with possessors. It is reasonable to expect people to guide their conduct by the prohibitions and penalties of the substantive law. It is rather less reasonable to expect them to know about the subtleties of rules of proof. Therefore, assigning the burden of persuasion to the defendant, even on a gratuitous defense, tends to deny citizens the fair notice that is constitutionally required of the criminal law.[79]

This is an argument for truth-in-labeling, and in principle it can be met by a system of better labels. It is possible at least to imagine a widespread public information campaign, designed to make proof rules as familiar to citizens as the substantive parts of the law.[80] In the ordinary course of events, however, such a campaign is unlikely to occur. Moreover, it is questionable whether even a very extensive campaign could easily overcome the widely shared expectation that defendants are treated as innocent until proven guilty, and that the prosecution must prove its case beyond a reasonable doubt. That

79. The same argument can be made, with somewhat less force, about a rule that merely reduces the government's burden to a requirement of proof by a preponderance of evidence.

This is not to suggest that the constitutional requirement of fair notice generally extends to procedural matters. Rather, it is to recognize that a change in the rule regulating the burden of persuasion can function much like a change in the substantive law. This attribute of rules of proof makes them candidates for achieving substantive compromise; it also makes them candidates for the concerns behind the requirement that people be given fair notice of the substantive commands of the criminal law.

80. Which, after all, are perhaps not as familiar as the ban on vague criminal statutes might suggest.

widely shared expectation poses a serious problem of fair notice for any attempt to adjust the rules of proof that govern the trial of a criminal case.

D. *The Slippery Slope*

A final objection to the argument for special treatment of gratuitous defenses is that the argument is exceedingly difficult to confine within reasonable bounds. The exception for gratuitous defenses is so large that it threatens to engulf the entire requirement of procedural due process. First, if the reasonable doubt rule applies only to facts that are constitutionally necessary for conviction, then it applies to a very small part of any criminal case, for very few facts are constitutionally necessary as a basis for criminal conviction. Second, the reasoning that would exempt gratuitous defenses from the reasonable doubt rule is equally applicable to other constitutional requirements of fair procedure as well.

1. *What issues are not "Gratuitous Defenses"?*

A defense is gratuitous in the sense of this discussion if the legislature has the power to eliminate it, and to redefine the crime to include the conduct described by the defense. By that definition, any graded series of crimes entails a set of gratuitous defenses, if the legislature could have replaced the graded series with a single broadly defined crime. Any issue that distinguishes one degree of crime from another in such a series is a gratuitous defense.

For example, Congress has specified five grades of federal bank robbery: taking less than $100, taking more than $100, using force and violence, using a dangerous weapon, and involving incidental death or kidnapping.[81] Congress could instead have created a single crime of bank robbery, with a wide range of possible sentences, and failed to specify the criteria that aggravate or mitigate the crime. In the existing statutory scheme, then, each fact that distinguishes one crime from another can be regarded as a gratuitous defense that Congress has the power to eliminate. On the theory of gratuitous defenses it would follow that under existing law the defendant could be convicted and punished for the most serious form of bank robbery

81. Robbery of an amount under $100 has a maximum penalty of $1000 and one year, 18 U.S.C. § 2113(b) (1970); if the amount is over $100, the maximum penalty is $5000 and ten years, *id.*; if force and violence are used, $5000 and twenty years, *id.* § 2113(a); if a dangerous weapon is used, $10,000 and twenty-five years, *id.* § 2113(d); if there is death or kidnapping, there is a mandatory minimum sentence of ten years, *id.* § 2113(e). *See* United States v. Canty, 469 F.2d 114, 127 (D.C. Cir. 1972).

on proof that he robbed a bank, unless he proved the facts that reduce his crime to a lower degree, *i.e.*, that there was no death, dangerous weapon, force, or theft over $100.

Or consider the various crimes of assault and homicide as a graded series, ranging from the most trivial assault, in which the defendant neither intends nor inflicts serious injury, to the most serious homicide, in which he both intends and inflicts death. It is likely that a legislature could, consistent with the Constitution, substitute for those crimes the single crime of Personal Attack, with a wide range of possible sentences. For an adherent to the theory of gratuitous defenses, it would follow that a legislature could authorize conviction and punishment for that crime on proof of a trivial assault, with the burden on the defendant to establish the mitigating defenses of the victim's survival, his freedom from injury, or the defendant's lack of intent to harm or injure.

Indeed, the theory of gratuitous defenses reaches not only the facts that distinguish one grade of crime from another, but also the facts that distinguish crime from related conduct that, while constitutionally punishable, is generally thought too trivial to punish. Thus, in a state that has eliminated the most trivial assaults from the catalog of crimes, it would nevertheless be permissible to authorize conviction for Personal Attack on proof of a noncriminal unconsented touching, with the burden on the defendant to prove the mitigating facts that would reduce or eliminate his crime.

In *Mullaney v. Wilbur*,[82] the Supreme Court emphatically rejected that view in the context of the traditional scheme for grading homicides. Under the law of Maine, the defendant had the burden of persuasion on the issue of provocation, the fact that distinguished murder from manslaughter. In defending that arrangement, Maine claimed that the state had the power to eliminate the defense of provocation; in fact, it had done so—by collapsing the two offenses into the single crime of felonious homicide, retaining provocation only as a criterion for mitigation of sentence. The Supreme Court first rejected the distinction between a criterion for mitigation of sentence and a criterion for reducing the grade of crime, observing quite correctly that the consequences of the two alternative arrangements were identical and the formal distinction should have no constitutional significance.[83] The Court then held that Maine could not require the

82. 421 U.S. 624 (1976).

83. *Id.* at 696-99.

The equivalence between mitigating the severity of sentence and reducing the grade of crime was especially clear in *Mullaney*, because the statutory scheme, although char-

defendant to prove provocation, because the concerns of *Winship* were fully implicated. The consequence of an erroneous determination on the issue of provocation would be an erroneous murder conviction subjecting the defendant to much more stigma and potential incarceration than would result from a conviction for manslaughter. That consequence means that an error is too serious to permit the State to exempt the issue from the rigors of the *Winship* rule.[84]

One commentator has suggested that *Mullaney* should be understood as holding, *sub silentio*, not that *Winship* applies to gratuitous defenses, but rather that the defense of provocation is not gratuitous.

acterized by the state court as a sentencing scheme, operated exactly like a traditional division of conduct into grades of crime. The fact at issue, provocation, concerned the seriousness of the crime; it was determined by the jury at the time of conviction; and a finding against the defendant had substantial legislatively specified consequences for both the potential period of incarceration and the label and stigma attached to the conduct (murder or manslaughter). As a result, the risk of bias, the costs of error, and the symbolic status of the decision were identical to those in a determination of the correct grade of crime.

When the fact at issue lacks one or more of these attributes, some might argue that the reasonable doubt rule is inapplicable. Statutes that authorize enhanced punishment for habitual or dangerous offenders sometimes call for factfinding by the judge rather than the jury, and the facts may concern the defendant's character rather than the seriousness of his crime; the facts are legislatively specified, however, with fixed consequences that involve labeling and stigma as well as incarceration. Under the analysis presented here, such factfinding should be subject to the reasonable doubt rule. When the fact at issue is the existence of prior convictions, most courts agree that proof beyond a reasonable doubt is required. *See* Note, *Recidivist Procedures*, 40 N.Y.U.L. REV. 332, 341-42 (1965) (citing cases). When the fact at issue is the defendant's dangerousness, there is more division of authority. *Compare* United States v. Duardi, 384 F. Supp. 874, 882-85 (W.D. Mo. 1974), *aff'd on other grounds*, 529 F.2d 123 (8th Cir. 1975) (enhanced sentence for "dangerous special offender," preponderance standard unconstitutional, reasonable doubt required) *with* United States v. Stewart, 531 F.2d 326, 334 (6th Cir.), *cert. denied*, 426 U.S. 922 (1976) (preponderance standard constitutional); United States v. Holt, 397 F. Supp. 1397, 1399-1400 (N.D. Tex. 1975), *rev'd in pertinent part on other grounds sub nom.* United States v. Bailey, 537 F.2d 845 (5th Cir. 1976) (same) *and* United States v. Neary, 552 F.2d 1184, 1193-94 (7th Cir. 1977) (preponderance standard constitutional for proof of dangerousness but reasonable doubt might be required for proof of status as a recidivist special offender). *See generally* Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 356 (1975) [hereinafter cited as *Two-Tiered Sentencing*]; *id.* at 383-84 & n.140 (discussion of standard of proof).

In traditional sentencing, the factfinding is often performed by the judge, at some time after conviction; the facts may concern the character of the defendant rather than the seriousness of the crime; moreover, the relevant facts may not be legislatively specified, or they may lack fixed consequences. Informal procedures for such factfinding have been upheld against constitutional attack, Williams v. New York, 337 U.S. 241 (1949), and that holding has been understood by some to include exemption from the reasonable doubt rule. *See Two-Tiered Sentencing, supra* at 363. Even in such factfinding, however, the reasons for the reasonable doubt rule are often present: the danger of bias against the defendant, the costs of error in terms of both stigma and incarceration, and the symbolic status of the decision. When the reasons are present, the rule should apply. *See generally* Fox & O'Brien, *Fact Finding for Sentencers*, 10 MELBOURNE U.L. REV. 163 (1975).

84. 421 U.S. at 699-701, 703-04.

Only if Maine is constitutionally prohibited from withholding the defense of provocation, he argues, is Maine constitutionally prohibited from assigning the defendant the burden of persuasion on that issue.[85] That view of *Mullaney* seems plainly wrong. Very little support can be found for the proposition that the defense of provocation, or any other defense, is constitutionally required. As commentators have long lamented, the Court has assiduously avoided the development of doctrine concerning the constitutional limits of the substantive criminal law.[86] Moreover, though it would be valuable to develop a framework for considering the question, there is no reason for any resulting theory to entail a requirement for the particular defense that was at issue in *Mullaney*.

One pertinent strand of existing case law indicates that the Constitution may require a defense for the person who violates the law without any volition or intent. Thus it is unconstitutional to punish a person for the status of addiction to narcotic drugs,[87] and it would be unconstitutional to punish for public drunkenness a man who could control neither his drunkenness nor his appearance in public.[88] These cases suggest that some form of the insanity defense is constitutionally required,[89] and perhaps also some form of the defenses of duress and self-defense. They also suggest that Maine could not create a crime of felonious homicide that encompassed all killings, without regard to intent or state of mind. But no elaboration of this principle would prevent Maine from eliminating the defense of provocation. Even a provoked homicide entails a mental element—recklessness, at least—that is generally deemed sufficient for criminal liability.

A second pertinent strand of case law indicates that the Constitution embodies a requirement of proportionality in punishment, so that extremely serious punishments cannot be inflicted for relatively minor

85. Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of* Mullaney v. Wilbur, 55 B.U.L. REV. 775 (1975).

86. *See, e.g.*, Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107.

87. Robinson v. California, 370 U.S. 660 (1962).

88. Powell v. Texas, 392 U.S. 514, 548 (1968) (White, J., concurring; necessary for disposition).

89. This is the view of the few courts that have considered the question under state constitutions. Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931) (per curiam); *see id.* at 155-71, 132 So. at 582-88 (Ethridge, J., concurring) (discussion of unconstitutionality of law); State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910). The argument is not that a separately labeled insanity defense is required, but that the Constitution requires acquittal of many people who are acquitted under present law on the ground of insanity. If the insanity defense were abolished, it would still be necessary to determine whether the defendant had a constitutionally sufficient mental state. ⟶ Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?* 72 YALE L.J. 853 (1963).

crimes.[90] It is at least arguable that the principle requires some refinement in the legislative grading of crimes. For if a statute defines a single crime that encompasses both minor and serious offenses, and prescribes a broad range of permissible penalties, then the minor offender is exposed to the possibility of a disproportionately severe sentence. The principle of proportionality may prohibit even that exposure. For crimes that carry severe sentences, then, the Constitution may require some defenses of degree—of minor intent, or minor harm, or extenuating circumstances of some other sort. But this principle would not specify the appropriate criteria for grading, and it need not prevent Maine from punishing a provoked homicide as seriously as an unprovoked one.

In fact *Mullaney* says nothing to support the view that the defense of provocation is constitutionally required. It merely notes the serious consequences that have been made to turn on the distinction between murder and manslaughter, and the resulting importance of protecting the defendant against an erroneous determination. On a straightforward reading, the case seems to hold that if a fact is important enough for serious criminal consequences to turn on it, then it is important enough to require proof by the government beyond a reasonable doubt.

2. *What procedural rights are not vulnerable to this exception?*

One result of the theory of gratuitous defenses is to restrict the application of the reasonable doubt rule to proof of a very small set of facts. A second, and perhaps more surprising, result is to impose that same restriction on other constitutional requirements of fair procedure as well. For if the gratuitous character of a defense is sufficient to authorize a legislature to compromise away one of the Constitution's procedural rules, it is hard to see what protects the other rules from

90. Weems v. United States, 217 U.S. 349, 380-82 (1910) (cruel and unusual punishment to impose 15 years hard labor in chains and perpetual loss of civil rights for falsifying an official document); Howard v. Fleming, 191 U.S. 126 (1903) (not cruel to impose 10 years imprisonment for conspiracy to defraud). This principle of proportionality has apparently been approved by a majority of the Supreme Court considering the constitutionality of capital punishment; the Justices divided only on the appropriate manner to apply the principle to the cases at hand. *See* Coker v. Georgia, 97 S. Ct. 2861, 2866-70 (1977) (White, J.; plurality opinion) (death excessive for rape); *id.* at 2870-72 (Powell, J., concurring and dissenting); Woodson v. North Carolina, 428 U.S. 280, 305 & n.40 (1976) (Stewart, J.; plurality opinion) (reserving question for felony-murder); Gregg v. Georgia, 428 U.S. 153, 176, 187 & n.35 (1976) (Stewart, J.; plurality opinion) (death not excessive for murder, expressly reserving question for other crimes such as rape, kidnapping, armed robbery); Furman v. Georgia, 408 U.S. 238, 279-81, 300-05 (1972) (Brennan, J., concurring); *id.* at 456-61 (Powell, J., dissenting).

similar compromise. But that result would squarely contradict a large body of established law.

For example, the defendant in a criminal case is constitutionally entitled to adequate advance notice of the principal facts at issue, so that he may prepare to meet the charges against him.[91] That requirement of fair notice extends to the crime as actually defined by the legislature, and not merely to the facts that are constitutional prerequisites for conviction. A defendant cannot be tried and convicted of murder after notice that he has been charged with assault, even though death of the victim is not a prerequisite to a constitutionally valid conviction. The defense that the victim survived may be gratuitous, but it nevertheless marks a distinction that warrants mention in a constitutionally adequate indictment or information. It is quite true, of course, that some facts at issue can be omitted from a valid indictment or information; among these are many matters commonly characterized as defenses.[92] But when notice is unnecessary for these matters, that is because omitting them from the charge is thought to pose no substantial likelihood of unfair surprise, and not because they are constitutionally gratuitous.

A similar argument can be made for each of the other procedural requirements established by the Constitution to govern the process of factfinding in a criminal case. The right to counsel could hardly be limited to the part of a criminal trial concerned with facts that are constitutionally required for guilt. Nor could the right to confront witnesses, the right to compulsory process, or the right to jury trial. Each of these procedural requirements is subject to limitations, but those limitations must be justified with respect to the purposes of the rule. The gratuitous character of a defense has no relevance to the purposes of any of these rules. Therefore, when the considerations behind the rule point toward its application, it is no contrary argument that the fact in issue is within the power of the legislature to remove from the case.

91. In federal prosecutions, this right is secured both by the Sixth Amendment right "to be informed of the nature and cause of the accusation," and by the Fifth Amendment right to indictment by a grand jury. In state prosecutions, the right to a grand jury indictment has been held inapplicable, Hurtado v. California, 100 U.S. 516 (1884), and many states proceed by information instead. But no matter what form the charge takes, it must provide adequate notice to the defendant, as a matter of due process. Cole v. Arkansas, 333 U.S. 196 (1948); De Jonge v. Oregon, 299 U.S. 353, 362 (1937). *See generally* Scott, *Fairness in Accusation of Crime*, 41 MINN. L. REV. 509 (1957).

92. On the requisites of an adequate indictment or information, see, *e.g.*, 5 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE §§ 2054-68 (1957); 8 MOORE'S FEDERAL PRACTICE ¶¶ 7.01-07 (2d ed. 1976); L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 194-265 (1947).

III. Problems of Proof

The reasonable doubt rule implements a strong constitutional preference for avoiding errors that favor the government in a criminal case. Given a fallible factfinder, the only way to guard against errors that favor the government is to reduce the chance of correct decisions that favor the government as well, by using a cautious rule of decision that tilts the scales against the government.[93] Nevertheless, the cost in errors favoring the defendant may seem high, and to reduce that cost courts and legislatures have sometimes approved exceptions to the reasonable doubt rule.

In two situations, the risk of error favoring the defendant has been thought sufficiently great to warrant an exception to the reasonable doubt rule. First, the defendant is sometimes required to prove a claim on the ground that he has better access to the principal evidence than does the government; his superior access to evidence gives him an opportunity to mislead the factfinder by withholding that evidence.[94] Second, the defendant is sometimes required to prove a claim on the

93. The literature of signal detection theory provides a helpful framework for considering the general problem of a fallible observer who attempts to detect signals, sometimes giving false alarms and sometimes missing true signals. *See generally* D. GREEN & J. SWETS, SIGNAL DETECTION THEORY AND PSYCHOPHYSICS (1966). The number and kinds of errors are determined by three independent factors: the inherent detectability of the signal by the observer, the decision criterion used by the observer to bias his results, and the frequency with which signals are actually given (called the a priori probability). *See id.* at 11-52.

The detectability of the signal specifies the extent to which it is possible for the observer to get results better than chance. *See id.* at 30-52. The detectability of the signal depends on the strength of the signal and the skill of the observer, and it is independent of any particular rule of decision. *See id.* at 110-15. With fixed signal strength and observing skill, the observer can control his errors only by choosing a rule of decision. He can seek to minimize all errors, in which case he will always choose the answer that seems even slightly more likely, *see id.* at 23; the proportion of false alarms among his errors will be determined by the detectability of the signal and by the frequency of signals among the observed events. Or he can choose a biased criterion in order to reduce or increase the chance of false alarms. *See id.* at 20-27. In general, using a biased criterion is likely to increase the total number of errors. This is because it departs from the observer's best efforts at accuracy, and therefore when it reverses some false decisions it must reverse more true ones. *See id.* at 409-10.

94. *E.g.*, Commonwealth v. Pauley, 331 N.E.2d 901, 909 (Mass.), *appeal dismissed*, 423 U.S. 887 (1975) (lack of personal participation as defense to charge that one's car was used with intent to evade payment of toll); People v. Kirkpatrick, 32 N.Y.2d 17, 25-27, 295 N.E.2d 753, 757-59, 343 N.Y.S.2d 70, 76-78 (1973), *appeal dismissed*, 414 U.S. 948 (1973) (lack of scienter as defense to charge of selling obscene material); People v. Felder, 39 App. Div. 2d 373, 376, 334 N.Y.S.2d 992, 995 (1972), *aff'd*, 32 N.Y.2d 747, 297 N.E.2d 522, 344 N.Y.S.2d 643, *appeal dismissed*, 414 U.S. 948 (1973) (unloaded gun as defense to first degree robbery). *But see* Mullaney v. Wilbur, 421 U.S. 684, 701-02 (1975) (seemingly rejecting argument relying upon defendant's greater access to evidence); *accord*, Turner v. United States, 396 U.S. 398, 407-08 n.8 (1970); Leary v. United States, 395 U.S. 6, 45 (1969); Tot v. United States, 319 U.S. 463, 469 (1943).

ground that it is especially unusual, and therefore especially unlikely to be true; in such circumstances even an apparently persuasive showing is suspect on statistical grounds.[95]

The nature and the purposes of the reasonable doubt rule cast suspicion on any effort to increase overall accuracy. The rule is designed to tilt the scales against conviction, expressly requiring an acquittal in close cases even when conviction is somewhat more likely the correct result. A principle that would depart from the rule in the interests of accuracy does not simply pit some other value against the values embodied by the reasonable doubt rule. It opposes the rule on its own terms.

Indeed, there would be almost nothing left of the reasonable doubt rule if the defendant could be required to prove all facts for which he has the best access to evidence, or all facts that are statistically improbable. Most facts at issue in a criminal case fall in at least one of those categories. The defendant's access to evidence is greater than that of the prosecution for any issue about his own behavior or state of mind. And the defendant's version of the facts is statistically improbable for most issues if the prosecutor is reasonably effective in selecting strong cases for trial. It may well be that most persons charged with crime are guilty, in which case the probability argument would justify assigning the entire burden of proving innocence to the defendant in a criminal case.

If the interest in accurate factfinding is to support an exception to the reasonable doubt rule, and not its rejection, then that exception

95. *E.g.*, Yee Hem v. United States, 268 U.S. 178, 183-84 (1925) (legal importation and lack of scienter as defense to possessing opium); Adams v. New York, 192 U.S. 585, 598-99 (1904) (lack of knowledge as defense to possession of policy paraphernalia); Buzynski v. Oliver, 538 F.2d 6, 10 (1st Cir.), *cert. denied*, 97 S. Ct. 503 (1976) (insanity).

Although analytically distinct, the two arguments are frequently invoked concurrently in a single case. For example, in Rossi v. United States, 289 U.S. 89 (1933), the Court confronted a challenge to a federal statute that prohibited possession of an unregistered still, and allocated to the defendant the burden of persuasion on the issue of registration. Upholding the statute, the Court observed that registration of the still was unlawful and hence extremely unlikely. *Id.* at 91. Moreover, if the still were in fact registered the defendant would possess the documents that would most effectively prove registration. *Id.* at 91-92. It is unclear whether *Rossi* would be decided the same way today. In subsequent cases the Court has held that due process imposes stringent limitations on the use of presumptive devices in criminal cases. Even a permissive inference, which does not shift the burden of persuasion, is required to meet some test of persuasiveness, and the Court has suggested without deciding that the test is persuasiveness beyond a reasonable doubt. *See* Barnes v. United States, 412 U.S. 837, 843-46 (1973); Turner v. United States, 396 U.S. 398, 404-05 (1970); Leary v. United States, 395 U.S. 6, 36 & n.64 (1969). If that demanding standard governs the use of permissive inferences, it should a fortiori govern the use of the kind of presumption that shifts the burden of persuasion. Even if a permissive inference is governed by a less demanding standard, a cloud remains over the more potent burden-shifting device.

must rest on peculiar problems of proof for particular issues. Moreover, if the exception is to preserve the values served by the rule, it must rest on a judgment that for some issues the functions of the rule are either unnecessary or outweighed in importance by severe problems of proof. These conditions are seldom satisfied.

A. *Access to Evidence*

If the evidence on an issue is sparse or nonexistent, then the factfinder cannot distinguish true from false claims much more effectively than by chance. A nearly unbiased rule of decision, which requires proof by a preponderance of evidence, would result in a high risk both of errors favoring the government and of errors favoring the defendant.[96] A cautious rule of decision, requiring proof by the government beyond a reasonable doubt, would distribute the errors differently, reducing the chance of a false conviction and increasing the chance of a false acquittal. No rule can enable a factfinder with low power of discrimination or little evidence to increase the chance of a true conviction without causing a proportional increase in the chance of a false conviction.

If it were possible to improve the power of the factfinder or the evidentiary situation, however, the risks of either kind of error would be reduced. And under the reasonable doubt rule, the risk of false conviction would remain negligible, while the risk of false acquittal (and hence the chance of a true conviction) would improve. A technique for eliciting relevant evidence and thereby improving the power of the factfinder thus offers the possibility of improving the accuracy of finding facts without in any way undermining the values behind the reasonable doubt rule.

The matter becomes more complicated, however, when the technique proposed for eliciting relevant evidence is to create an exception to the reasonable doubt rule. The problem of sparse evidence sometimes arises not because evidence is unavailable but because the parties have failed to collect and produce available evidence. The risk of that failure may seem especially acute when the important evidence on an issue is more accessible to the defendant than to the government. Under a rule requiring proof by the government beyond a reasonable

96. More precisely, the distribution of errors depends on the a priori probabilities, *see* note 93 *supra*. If the factfinder produces results approximately by chance, then it should divide both the guilty population and the innocent population in half, convicting half of the guilty group and half of the innocent group. The ratio of false convictions to false acquittals will be the same as the ratio of truly innocent to truly guilty people in the population under study.

doubt, the defendant may deliberately fail to collect and produce evidence in the expectation that he will prevail if no evidence at all is produced.[97] In order to elicit evidence that is peculiarly accessible to the defendant, courts and legislatures have sometimes assigned to the defendant the burden of persuasion on particular issues. On that reasoning, defendants have been required to prove insanity,[98] or a proper purpose,[99] or the possession of a valid license.[100]

The device of assigning the burden of persuasion to the defendant may well be effective at eliciting relevant evidence, and it probably avoids the constitutional objection to more direct devices for eliciting evidence from a criminal defendant, an objection rooted in the Fifth Amendment's ban on compulsory self-incrimination.[101] Nevertheless, even though eliciting evidence in this manner may not violate the ban on self-incrimination, it does grave violence to the values served by the reasonable doubt rule itself. For an exception to the reasonable doubt rule does more than elicit evidence from the defendant. Even if the defendant produces all the evidence available to him, the burden of persuasion remains with him, and close cases are resolved

97. Especially in light of the limitations on the power of the government to compel the defendant to produce evidence, by virtue of the Fifth Amendment privilege against compelled self-incrimination and the limited authority for pretrial discovery in criminal cases. The force of this objection should not, however, be overstated. The Fifth Amendment limits the government only with respect to evidence that is both testimonial in character, United States v. Dionisio, 410 U.S. 1, 5-7 (1973), and within the personal control of the defendant, Andresen v. Maryland, 427 U.S. 463 (1976), leaving considerable room for the exercise of legal compulsion to obtain evidence from other sources, or nontestimonial evidence from the defendant. Prevailing discovery rules impose other limitations, which stem at least in part from the reluctance of the government to permit reciprocal discovery by the defendant. *See* Wardius v. Oregon, 412 U.S. 470, 472-79 (1973). There is a trend toward liberalization of discovery in criminal cases, which may do more to relieve problems of access to evidence than any change in the rules governing the burden of persuasion. Finally, even when the defendant is immune from direct legal compulsion, the risk of conviction is a powerful incentive for him to produce evidence because his failure to do so is likely to count strongly against him with the factfinder, and might well increase the risk of conviction under any burden of persuasion.

98. *E.g.*, Buzynski v. Oliver, 538 F.2d 6, 10 (1st Cir.), *cert. denied*, 97 S. Ct. 503 (1976); Grace v. State, 231 Ga. 113, 200 S.E.2d 248 (1973).

99. *E.g.*, James v. United States, 350 A.2d 748, 749-50 (D.C.), *cert. denied*, 429 U.S. 872 (1976).

100. *E.g.*, Rossi v. United States, 289 U.S. 89, 91-92 (1933); Mugler v. Kansas, 123 U.S. 623, 674 (1887); Commonwealth v. Davis, 359 Mass. 758, 758, 270 N.E.2d 925, 926 (1971). It is not clear why the license cases belong in this category at all. The defendant has ready access to evidence concerning his license, but the state has equally good access to equally good evidence. The issue is hardly distinguishable from others in this respect. The defendant's access to evidence is no greater here than for most other issues in a criminal case, since most of those issues concern his own behavior or state of mind. And the state's access to evidence is not peculiarly limited here; indeed, it is greater than for many issues that are traditionally assigned to the prosecution's case, such as those involving the defendant's intent or state of mind.

101. *See* note 97 *supra*.

against him. At the moment of decision, the function of compensating for bias against the defendant is utterly abandoned, as are the symbolic function of the rule and the constitutional judgment about the relative costs of errors. The constitutional valuation of errors might seem to be served by a device which improves the power of the factfinder, because for a given rule of decision such a device improves the ratio of true convictions to false ones. But any improvement in that ratio is undermined if it is accomplished by moving the factfinder from a cautious rule of decision to an unbiased one, which calls for nearly equal errors of each kind.

If there were no alternative device for eliciting evidence from the defendant, the need might be sufficient to warrant an exception from the reasonable doubt rule and a sacrifice of the values it protects. Many jurisdictions, however, have found a less drastic device adequate to the purpose. In the federal courts, and in many states, issues for which the defendant is thought to have special access to persuasive evidence are governed by a rule that assigns to the defendant a burden of producing evidence,[102] but not the ultimate burden of persuasion. Under such a rule, some threshold level of evidence is specified as adequate to raise the issue. If that threshold is not met, the issue is not put to the factfinder, and the effect is similar to a directed verdict for the government on that issue. If the threshold requirement is satisfied, then the issue is presented to the factfinder under the ordinary rule requiring proof by the government beyond a reasonable doubt.[103] In theory this rule should be somewhat less effective at eliciting evidence than an exception to the reasonable doubt rule, because a defendant might satisfy the threshold requirement while withholding evidence he would introduce were he required to carry the burden of persuasion. In practice, however, it is often difficult for a defendant to calculate so finely or divide his evidence so precisely; moreover, the threshold requirement can be adjusted somewhat to take account of special problems.[104] Many federal and state courts have long used this

102. The terms are defined in note 3 *supra*.

103. In a jury trial, failure to meet the burden of producing evidence has the result of removing the issue from the jury; it is resolved against the defendant by the judge, and the jury never hears about it. In a trial before a judge, failure to meet the burden of producing evidence of course has no role in selecting which decisionmaker will decide the issues. It does, however, affect the process of decision, since it leads to a decision against the defendant without reference to the reasonable doubt rule. For a case involving trial before a judge, see United States v. Freeman, 498 F.2d 569, 576 (2d Cir. 1974).

104. The commentary on what will satisfy the burden of producing evidence is singularly unhelpful. Distinctions are made between the "scintilla" of evidence that will not suffice, and "some evidence" that will. *See* C. McCormick, *supra* note 9, at § 338; 1

rule for insanity,[105] duress,[106] entrapment,[107] and other defenses presenting peculiar problems of access to evidence.[108] A jurisprudence has developed for each issue concerning the sort of evidence that will satisfy the burden of production. Unless for some issue there is reason to doubt the effectiveness of this device, the interest in improving access to evidence cannot provide a sufficient reason to abandon the values served by the reasonable doubt rule.

B. *Improbable Claims*

The risk of various kinds of errors is affected not only by the power of the factfinder and by the choice of a rule of decision, but also by the facts about the population being tried. If for some issue the defendant's claim is highly improbable, then the chance of falsely rejecting it is small, no matter what factfinder or what decision rule is in use. For highly improbable claims, then, perhaps there is no need to compensate for bias against the defendant or to introduce bias in his favor.

The argument has been more confused than necessary because courts have in general failed to specify what is meant by an improbable claim.[109] Is the prevalence of the defendant's claim to be evaluated against the universe of all people, or all criminal defendants? Should it be, more narrowly, all defendants charged with his sort of crime, or, more broadly, all people who in fact engage in the conduct alleged, whether or not they are charged with crime?

To illustrate the nature of the confusion, suppose it is a crime to sell alcoholic beverages without a license. In allocating the burden of

WORKING PAPERS OF THE NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS 15-17 (1970). In the context of particular issues, and recurring fact situations, however, courts have developed a common law of sufficiency for this purpose. *See, e.g.*, Kadis v. United States, 373 F.2d 370, 374-75 (1st Cir. 1967) (discussing evidence sufficient to raise issue of entrapment).

105. For federal courts, the rule was established in Davis v. United States, 160 U.S. 469, 476 (1895). For states, see, *e.g.*, Gales v. State, 338 So. 2d 436, 438 (Crim. App. Ala.), *cert. denied*, 338 So. 2d 438 (Ala. 1976); People v. Wells, 30 Ill. App. 3d 968, 968, 333 N.E.2d 496, 497 (1975).

106. *E.g.*, United States v. Smith, 532 F.2d 158, 161 (10th Cir. 1976); People v. Manson, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976); Commonwealth v. Kennedy, 341 N.E.2d 697, 698-99 (Mass. App. 1976).

107. *E.g.*, United States v. Robinson, 539 F.2d 1181, 1184 (8th Cir. 1976); Notaro v. United States, 363 F.2d 169, 174-75 n.6 (9th Cir. 1966); People v. Wurbs, 38 Ill. App. 3d 360, 364-65, 347 N.E.2d 879, 882-83 (1976).

108. *E.g.*, United States v. Ortega, 517 F.2d 1006, 1010 (3d Cir. 1975) (reliance on official advice as defense to fraud to grand jury); People v. Patrick, 541 P.2d 320, 322 (Colo. App. 1975) (choice of evils as defense to kidnapping); Holland v. State, 352 N.E.2d 752, 760-61 (Ind. 1976) (abandonment as defense to felony-murder).

109. *See, e.g.*, cases cited in note 95 *supra*.

proof on the issue whether the seller was licensed, should we be concerned with the prevalence of licenses in the general population? In the population of persons who sell alcoholic beverages, legally or illegally? In the population of persons accused of illegal sales? Accused persons who claim to have a license? Licenses may be extremely rare in the general population, more common in the class of all sellers, less common in the class of accused sellers. Is the defense of having a license, then, an improbable claim which should for that reason be allocated to the defendant? Or is selling without a license the rare event, which should for that reason be proved by the prosecution?

If a change in the rules of proof is designed to compensate for an especially high risk of error in the case of improbable claims, then the probability judgment should be made for the class of cases to which the rule will apply. And that is the class of prosecutions that proceed to trial on the issue in question. Unfortunately, it is not only difficult to assess the characteristics of that class at any given time, but also unrealistic to assume that the composition of the class is stable. Any change in the rules of proof will have some effect on decisions to prosecute. If the defendant is assigned the burden with respect to an improbable claim, then prosecutors will proceed more readily in the face of that claim. The net result may be that in the new class of litigated cases, the claim is no longer so improbable, and the rule of proof is no longer justified. And of course the cycle can work just as well in reverse.

Moreover, even after an improbable claim has been identified, there is no reason to regard it as especially vulnerable to inaccurate decisionmaking. The unusual character of a claim should ordinarily affect the factfinder's evaluation of the evidence. The factfinder is quite properly skeptical of a story that seems to him improbable in the light of his common-sense knowledge of ordinary human events.[110] If, having discounted the defendant's claim for its improbability, he nevertheless finds the case a close one, it would be redundant to use a burden-of-proof rule that directs him to discount the claim still further for its improbability. Under such a rule, the defendant with an unusual claim is doubly damned for it.[111]

110. The standard jury instructions for use in the federal courts tell the jury to give the evidence "a reasonable and fair construction, in the light of your common knowledge of the natural tendencies and inclinations of human beings." 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 15.01 (3d ed. 1977). This instruction is consistent with the Supreme Court's repeated assertion that the essential function of the jury is to exercise "the commonsense judgment of a group of laymen." Williams v. Florida, 399 U.S. 78, 100 (1970); *see also* Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972).

111. *See* Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 817-18 (1961).

Suppose, for example, that it is relatively rare for bank robbers, or anyone else, to experience the threats that give rise to a valid duress defense. The infrequency of duress in general, or among bank robbers, properly causes the factfinder to be skeptical of evidence tending to show duress. That infrequency would be counted twice if it also generated an instruction that the defendant should bear the burden of persuasion on the issue, that a close case should be resolved against the claim.

Unless there is special reason to doubt the reliability of the factfinder, the goal of accurate factfinding cannot justify a principle that allocates the burden of proof in accordance with statistical probabilities. The fact that a claim is improbable is not sufficient to mark that claim as peculiarly vulnerable to error and therefore appropriate for an exception to the reasonable doubt rule. The exception is appropriate only for those claims that are not only improbable, but also likely to be consistently misperceived by the factfinder.

It is not easy, however, to identify issues that meet this description. Without contrary evidence it must be assumed that the probabilities of the case are adequately taken into account by the factfinder, and therefore the problem of compensating for improbable defense claims cannot provide a sufficient reason to withdraw protection from the values served by the reasonable doubt rule.

IV. Facts that Justify Conviction

If the Constitution permits a legislature or court to exempt some issues in a criminal case from the reasonable doubt rule, the criteria for identifying those issues must be related to the purposes of the rule. One might argue simply that the reasonable doubt rule is designed to minimize certain kinds of errors: to declare the unacceptable character of erroneous convictions, and to make them much less likely than erroneous acquittals. With respect to that purpose, every issue in a case might seem to be like every other because for any issue an erroneous decision against the defendant leads to a conviction that is in some sense erroneous. The only reason to exempt an issue would be that other factors adequately tilted the scale toward the defendant on that issue, rendering the reasonable doubt rule unnecessary.[112]

The basis for the reasonable doubt rule can, however, be more precisely put: errors favoring the government are not all equally offensive. The rule is one of several constitutional provisions that set

112. *See* Part III *supra*.

criminal prosecutions apart from determinations of civil liability.[113] These rules create special barriers to a criminal conviction, recognizing and reinforcing its unique significance for the defendant and for the community. The special character of a criminal conviction lies in its substantial stigmatizing effect, the possibility of imprisonment, and the fact that it serves not merely to impose costs on the defendant but also to express the condemnation of the community.[114] The costs to a defendant of an erroneous conviction are the same, no matter what issue is wrongly decided. But for the community some errors are more repugnant than others, and some such distinction can fairly be read into the constitutional requirement of proof beyond a reasonable doubt. The constitutional preference for avoiding erroneous convictions is part of a broader commitment to individualized justice, at the cost of efficiency, in determining whether a defendant has committed a crime and thereby made himself vulnerable to punishment. Because the criminal sanction is an especially serious matter for both the defendant and the community, it is especially important to ensure that it is imposed only on a defendant who has forfeited his right to be free from punishment. The reasonable doubt rule reflects a partic-

113. Some of them are cited in note 68 *supra*. In addition, criminal proceedings are singled out for special treatment in the provision for interstate extradition, U.S. CONST. art. IV, § 2, cl. 2; the ban on double jeopardy and compulsory self-incriminization, *id.* amend V; the ban on cruel and unusual punishment, *id.* amend. VIII, as construed in Ingraham v. Wright, 97 S. Ct. 1401, 1410-11 (1977); the restriction of involuntary servitude to cases of punishment for crime, U.S. CONST. amend. XIII.

There is room for disagreement, of course, about what constitutes a criminal prosecution, and the answer has not always been the same for all purposes. *Compare In re* Gault, 387 U.S. 1, 49-50 (1967) (juvenile delinquency proceedings criminal for purposes of privilege against self-incrimination) *with* McKeiver v. Pennsylvania, 403 U.S. 528, 541, 550-51 (1971) (juvenile delinquency proceedings not criminal for purposes of right to jury trial).

114. Professor Henry Hart attempted to describe the distinctive method of the criminal law in his important article, *The Arms of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958). *See also* H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 1 (1968). It has been argued that a distinctive criminal law method based on blameworthiness should be abandoned. *See, e.g.*, B. WOOTTON, CRIME AND THE CRIMINAL LAW 52-57, 117-18 (1963). One response is that it is desirable for various reasons to maintain a system with the special substantive character and therefore the associated procedural safeguards of criminal law. *See, e.g.*, H.L.A. HART, *Changing Conceptions of Responsibility*, in PUNISHMENT AND RESPONSIBILITY 186 (1968). Another response is that it is inevitable that any system for dealing with the behavior now called criminal will entail the sanctions and attitudes that characterize present criminal law and therefore require the procedural safeguards. *See, e.g., In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973) (consequences of involuntary civil commitment similar to criminal conviction; proof beyond reasonable doubt required); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 421 U.S. 957 (1975) (many criminal procedures apply to civil commitment because consequences similar to conviction). It seems to be common ground, at least, that the criminal law as presently arranged is characterized by sanctions and attitudes relating to culpability that distinguish it from other legal proceedings.

ular concern with accurate determination of the facts that establish the forfeiture, the facts that provide what might be called the justification for invoking the criminal sanction.

That commitment to individualized justice need not extend, however, to the determination of facts that are tied more closely to the proper administration of institutions than to the justification for convicting the defendant.[115] Such facts may well have practical importance for the outcome of a case. They do not, however, form part of the factual predicate for imposing the criminal sanction. In determining these facts, an error favoring the government does not directly threaten the values served by the reasonable doubt rule. When the culpability of the defendant is not at issue, the determination has little symbolic importance. As a first approximation, then, it seems reasonable to conclude that the constitutional aversion to errors that favor the government is limited to errors in determining facts that establish individual culpability.[116]

On this theory, the rule need not apply to the determination of facts that merely control the admissibility of evidence in a criminal case. Before a confession can be admitted it must be found voluntary;[117] before the fruits of a search can be admitted, the search must be

115. *See* note 49 *supra* (distinction between substance and procedure). Earlier it was argued that procedural rules, or rules for the management of litigation, are less central to the concern of the political branches than rules for "primary" conduct. From that premise it was possible to make sense of the constitutional strategy that regulates procedure much more stringently than it regulates substantive criminal law. Among the procedures imposed by the Constitution is the rule requiring proof beyond a reasonable doubt. When it comes to defining the proper scope of the rule, the substance-procedure distinction is again useful, but with a reverse twist. Although the reasonable doubt rule is procedural in the sense that it is a rule for the management of litigation, its primary purpose is to affect the outcome of that litigation and therefore to affect substantive rights. For that reason burden-of-proof rules have often been classed as substantive for purposes that are not of immediate concern, *e.g.*, Palmer v. Hoffman, 318 U.S. 109, 117 (1943) (law applicable in federal diversity cases); Robinson v. Gaines, 331 S.W.2d 653, 655-56 (Mo. 1960) (interstate choice of law). *But see* Weir v. New York, N.H. & H.R.R., 340 Mass. 66, 69, 162 N.E.2d 793, 797 (1959). *See generally* RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 133-34 & Reporter's Notes (197→ Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 180-94 (1944).

More to the point, the reasonable doubt rule is concerned with those issues that are themselves substantive rather than procedural. The result can be visualized as three levels of constitutional regulation: the Constitution imposes minimal requirements on the substantive criminal law; stringent requirements on the procedures for proving substantive claims; and minimal requirements on the procedures for proving procedural claims.

116. A number of commentators have taken this view. *See, e.g.*, H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 136-39 (1968). Professor Fletcher noted with approval a trend in American and continental law toward the isolation of issues relating to culpability for decision under strict burden-of-proof rules. Fletcher, *supra* note 21, at 910-25, 933-35.

117. Jackson v. Denno, 378 U.S. 368 (1964).

found legal;[118] before hearsay testimony can be admitted, it must be found to fit within an exception to the hearsay rule.[119] The determination of these preliminary facts does not as a matter of law either control or justify the outcome of the case, though in practice it may well be dispositive. But a person is not less culpable because he has made an involuntary confession, been subjected to an invalid search, or been damned by improperly admitted hearsay testimony. If an error favoring the government is made in determining such an issue, it does not necessarily follow that any resulting conviction imposes criminal sanctions on an innocent or undeserving person. An error in determining admissibility may impair the accuracy of the decision about guilt, it may enhance the accuracy of the decision, or it may do neither. It has no necessary relation to the accuracy of the decision to convict.[120] On this reasoning the Supreme Court in *Lego v. Twomey*[121] held that the reasonable doubt rule does not govern proof of the voluntariness of a confession.[122] Because that rule is best understood as a barrier to convictions that lack a basis in the defendant's conduct, the *Lego* Court was correct in refusing to find the rule applicable of its own force to questions of admissibility. As the *Lego* dissenters noted, there may be independent reasons of policy or of constitutional principle to invoke the higher standard of proof for these issues. That would be appropriate if for a particular issue considerations of individualized justice, or other reasons, made it important to make a symbolic and practical commitment to avoiding errors in favor of the government.[123] But that inquiry must be separately made for each preliminary issue; the answer does not follow from the constitutional commitment to avoid erroneous convictions, expressed in *Winship*.[124]

118. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

119. *See* C. McCORMICK, *supra* note 9, §§ 244-327.

120. Hearsay testimony is excluded to enhance the reliability of factfinding, and involuntary confessions are excluded at least partly for the same reason. It might therefore be argued that error in admitting such evidence necessarily impairs the accuracy of the decision about guilt. But evidence that falls in a category generally thought unreliable may nevertheless in a particular case be sufficiently reliable to enhance the accuracy of factfinding or at least to avoid impairing it. The relationship between the error in admitting such testimony and an erroneous decision to convict is contingent rather than necessary. Moreover, because the admissibility decision is somewhat remote from the decision about guilt, less symbolic importance attaches to the rule that governs the admissibility decision.

121. 404 U.S. 477, 486-87 (1972).

122. *Lego* upheld a statute that imposed the burden of persuasion on the government, but required only proof by a preponderance of evidence.

123. 404 U.S. at 494-95 (Brennan, J., dissenting).

124. For a fine treatment of burdens of persuasion for these threshold issues in the wake of *Lego*, ➞ Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975).

A second class of issues can also be excluded on this analysis from the requirement of proof by the government beyond a reasonable doubt. Some questions of fact must be resolved to determine whether a case is properly before the court. In determining whether a prosecution is barred by double jeopardy,[125] or by a practice of discriminatory enforcement,[126] courts have sometimes assigned the burden of persuasion to the defendant. In determining whether the statute of limitations has run,[127] whether jurisdiction and venue are proper,[128] or whether the defendant is mentally competent for trial,[129] courts have sometimes assigned the burden of persuasion to the defendant; more often it is assigned to the prosecution, but proof by a preponderance of evidence will suffice.[130] These issues, unlike the issues of admissibility, may control the outcome of the case as a matter of law, and not just as a matter of practicality. It is in law a prerequisite to criminal conviction that the defendant be tried without double jeopardy or discriminatory enforcement, in a court of competent jurisdiction, in a timely fashion, in a condition of mental competence.[131] Put more precisely, however, these facts are prerequisite to the hearing that leads to conviction; they are not invoked to justify the conviction or explain the wrongfulness of the defendant's conduct. These facts determine the appropriateness of the forum and not of the sanction. If an error favoring the government is made on such an issue it does not necessarily follow that any resulting conviction imposes criminal sanctions on an innocent or undeserving person. As with the facts that

125. *E.g.*, United States v. Potash, 118 F.2d 54, 56 (2d Cir.), *cert. denied*, 313 U.S. 584 (1941); Kastel v. United States, 23 F.2d 156, 156 (2d Cir. 1927), *cert. denied*, 277 U.S. 604 (1928).

126. *E.g.*, People v. MacFarland, 540 P.2d 1073, 1075 (Colo. 1975); City of Minneapolis v. Buschette, 240 N.W.2d 500, 503 (Minn. 1976); People v. Acme Markets, 37 N.Y.2d 326, 331, 334 N.E.2d 555, 557-58, 372 N.Y.S.2d 590, 594 (1975).

127. *E.g.*, Osborn v. State, 86 Okla. Crim. 259, 268-72, 194 P.2d 176, 181-83 (1948).

128. *See* United States v. Holmes, 18 U.S. (5 Wheat.) 412 (1820).

129. *E.g.*, Johnson v. Brierley, 334 F. Supp. 661 (E.D. Pa. 1971); State v. Marks, 252 La. 277, 211 So. 2d 261 (1968), *vacated on other grounds*, 408 U.S. 983 (1972), *on remand*, 263 La. 355, 268 So. 2d 252 (1972); Young v. Smith, 8 Wash. App. 276, 505 P.2d 824 (1973); R. v. Podola, [1960] Q.B. 325 (C.A.).

130. *E.g.*, United States v. DiGilio, 538 F.2d 972, 986-89 (3d Cir. 1976), *cert. denied*, 97 S. Ct. 1119 (1977) (competence); Hill v. United States, 284 F.2d 754, 755 (9th Cir. 1960), *cert. denied*, 365 U.S. 873 (1961) (venue); Holdridge v. United States, 282 F.2d 302, 305 (8th Cir. 1960) (Blackmun, J.) (venue); People v. McGill, 10 Cal. App. 2d 155, 159-60, 51 P.2d 433, 435 (1935) (statute of limitations).

131. Indeed, some aspects of jurisdiction, venue, and mental competence are required not only by statute but also by the Constitution. The Sixth Amendment guarantees a federal defendant the right to a trial by a jury "of the State and district wherein the crime shall have been committed"; and due process guarantees every defendant the right to be tried in a condition of mental competence, Pate v. Robinson, 383 U.S. 375, 377 (1966). The Constitution is also the source of the ban on double jeopardy, U.S. CONST. amend V., and discriminatory enforcement, *id.* amend. XIV (equal protection).

determine admissibility of evidence, an error may enhance or impair the accuracy of the decision to convict, or it may do neither. It has no necessary relation to the accuracy of that decision. If the reasonable doubt rule is understood to protect against unjustified convictions, the rule need apply only to the proof of the facts that have legal status as part of the justification for conviction. These threshold facts are not in that class. Once again, there may be independent reasons to invoke the higher standard of proof for those issues. That result does not follow, however, from the strong preference of *Winship* for avoiding unjustified convictions.

Limiting the reasonable doubt rule to proof of issues related to culpability seems, in general, to protect the values served by the reasonable doubt rule. The culpability criterion is, however, exceedingly difficult to apply, because it is often difficult to determine whether an issue should be characterized as relevant to culpability.

For example, some courts have treated the defense of entrapment as an exception to the reasonable doubt rule, on the theory that the rule applies only to issues involving culpability, and that entrapment is not such an issue.[132] In their view, a defendant induced to sell narcotics by a government official is neither more nor less culpable than one induced to do it by a private acquaintance. His defense prevails in order to discourage government officials from generating crime, and to avoid judicial participation in that enterprise. Other courts have suggested that the defense reflects the view that a reluctant criminal is less culpable than his eager counterpart.[133] If the defense

132. *E.g.*, United States v. Braver, 450 F.2d 799, 801-05 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972); People v. Valverde, 246 Cal. App. 2d 318, 322-26, 54 Cal. Rptr. 528, 530-33 (1966); People v. Laietta, 30 N.Y.2d 68, 74-75, 281 N.E.2d 157, 161, 330 N.Y.S.2d 351, 356-57, *cert. denied*, 407 U.S. 923 (1972).

133. *See* United States v. Russell, 411 U.S. 423, 436 (1973) (defendant's predisposition fatal to entrapment defense because he was "not an 'unwary innocent' but an 'unwary criminal' "). Professor Park has argued persuasively that the defense as formulated by the federal courts can best be understood as a judgment about culpability. Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 240-43, 265 (1976). He suggests that the reluctant criminal may be seen as less culpable whether his temptor is a public official or a private person, and that the defense may be limited to cases of official inducement for reasons extrinsic to culpability.

Indeed, even the limitation of the defense to cases of official inducement might be explained with reference to culpability, on the theory that a person induced to sell narcotics to a government official is less culpable than one who sells to a private person, because the sale causes no harm and is therefore no more culpable than shooting a hallucination or stealing one's own umbrella.

The relationship of harm to culpability is controversial, to say the least. For an extended argument that harm is irrelevant to culpability and also irrelevant to dangerousness, and should therefore be of little significance for the criminal law, → Schulhofer, *Harm and Punishment: A Critique of Emphasis on Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974). The criminal law does take extensive account of

relates to culpability, it is subject to proof by the government beyond a reasonable doubt. If not, it can properly be exempted from the rule.

The relationship of the insanity defense to culpability is similarly controversial. In the 1952 case of *Leland v. Oregon*,[134] the Supreme Court upheld an extraordinary statute requiring the defendant to prove the defense of insanity beyond a reasonable doubt. In rejecting the defendant's challenge, the Court observed that insanity was an issue set apart from guilt of the crime charged, and that guilt had been proved beyond a reasonable doubt.[135] On the authority of *Leland*, many courts have subsequently sustained statutes requiring the defendant to prove insanity by a preponderance of evidence.[136] One characteristic explanation is that insanity does not negate culpability; that the reason for the defense is simply to direct insane offenders to special institutions, more suitable than prisons, for their confinement.[137] The opposing view of the insanity defense was clearly stated by Justice Frankfurter, dissenting in *Leland*.[138] For him, the purpose of the insanity defense is precisely to prevent the conviction of persons who could not have acted otherwise, who are not properly regarded as culpable.[139]

Similar difficulties arise in connection with crimes that specify some fact about the identity of the victim.[140] The critical facts about

harm, in the many respects detailed by Professor Schulhofer, because lawmakers have traditionally regarded harm as a significant index of the seriousness of a crime, if not the culpability of an offender. It will be argued at pp. 1345-47 *infra* that a fact that measures the seriousness of a crime, even if it does not measure the culpability of the offender, should be seen as part of the justification for punishment, and therefore subject to the reasonable doubt rule.

134. 343 U.S. 790 (1952).

135. *Id.* at 794-96.

136. *E.g.*, United States v. Greene, 489 F.2d 1145, 1154-56 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 977 (1974); Rivera v. State, 351 A.2d 561 (Del.), *appeal dismissed for want of a substantial federal question*, 429 U.S. 877 (1976) (a disposition with precedential value under Hicks v. Miranda, 422 U.S. 332, 343-45 (1975)); *cf.* Mullaney v. Wilbur, 421 U.S. 624, 705-06 (1975) (Rehnquist, J., concurring) (citing *Leland* with approval).

137. *See* Goldstein & Katz, *supra* note 89.

138. 343 U.S. at 802.

139. Justice Frankfurter thought that problems of proof would justify some adjustment in the rules of proof for the insanity defense. *Id.* at 804-05. It is unclear whether he contemplated a rule giving the defendant the burden of persuasion by a preponderance of evidence, or merely giving the defendant the burden of producing some evidence to raise the issue. *See* Part III *supra*. But he rejected problems of proof as a justification for the Oregon statute giving the defendant the burden of persuasion beyond a reasonable doubt. *Id.* at 805-06. And he rejected in its entirety the argument that insanity is not related to culpability. *Id.*

140. *See, e.g.*, Lucas v. United States, 163 U.S. 612 (1896) (murder of non-Indian by Indian in Indian Territory); Dershowitz, *The Special Victim Is Not New In the Law*, N.Y. Times, Mar. 27, 1977, § IV, at 6, col. 3 (discussing proposals to upgrade crime of assaulting elderly).

the victim may be seen as relevant to culpability, or they may relate only to the jurisdiction of the court or other institutional considerations. For example, it is a federal crime to assault a federal officer,[141] and not, in most circumstances, to assault a private citizen. Can the defendant in such a case be required to prove that his victim was not a federal officer, on the ground that the federal character of the victim does not affect culpability? The federal character of the victim may be merely a ground of federal jurisdiction, determining only which institution, federal or state, shall receive which of the equally culpable offenders.[142] Alternatively, the federal character of the victim may heighten the culpability of the assault, in that the assault not only injures a person but also insults and interferes with the conduct of government business.[143]

Such controversies can, in principle, be resolved. Legislative history may show directly whether the legislature that enacted the statute regarded a fact as important for reasons relating to culpability or for other reasons. A comparison of possible sentences may suggest the answer to that question indirectly, on the theory that a longer possible sentence suggests a judgment of greater culpability. Alternatively, it may be appropriate to consider the views of legislators and their constituents at the time of enforcement, to the extent they can be ascertained, in order to determine whether the defense reflects a judgment about culpability, or serves some other purpose. This difficulty in applying the culpability criterion does not destroy the possibility of its use. It merely makes plain that to resolve questions about the scope of the reasonable doubt rule, it will be necessary to analyze and resolve questions about the structure of the criminal law, and the relationship among issues in a criminal case.

The culpability criterion confronts a more serious problem, however, which requires that it be augmented. Under existing law, some crimes are defined in such a way that a fact is critical to the wrongfulness of the conduct and the reason for proscribing it, but the fact has no relationship to the defendant's personal culpability, because it

141. 18 U.S.C. § 111 (1970).

142. *Cf.* United States v. Feola, 420 U.S. 671, 676 n.9 (1975) (federal character of the victim need not be known or intended by the assaulter, because it is "jurisdictional only").

143. It is suggestive, but not conclusive, to note that there is a disparity in penalties. The maximum penalty for assaulting a federal officer is three years. 18 U.S.C. § 111 (1970). For simple assault, the maximum penalty under state law is generally a year or less. *See, e.g.*, CAL. PENAL CODE § 241 (West 1970 & Supp. 1977) (6 months); D.C. CODE § 22-504 (1973) (12 months); MICH. COMP. LAWS §§ 750.81, 750.504 (1968) (90 days); MO. ANN. STAT. § 559.220 (Vernon 1953) (6 months). *See also* MODEL PENAL CODE § 201.10, Comment at 81 & App. G at 132-40 (Tent. Draft No. 9, 1959).

may be beyond his knowledge or control. For example, it may be a crime to sell liquor to a minor, without regard to the seller's knowledge of the buyer's minority status.[144] The age of the buyer is precisely what makes the conduct wrongful, and thus it is part of the justification for punishment in the sense of this article. Nevertheless, in the absence of knowledge or at least negligence on the part of the defendant, the age of the buyer seems irrelevant to the culpability of the seller's conduct. If it is not culpable to sell liquor to an adult, it cannot be culpable to sell liquor to someone reasonably believed to be an adult, when that person is in fact a minor. One need not reject the purpose of the law to note that it punishes as criminal some people who lack personal culpability.

The wisdom of imposing criminal punishment for conduct that lacks any significant component of personal culpability is subject to serious question.[145] Nevertheless, so long as such conduct is treated as criminal, the facts that establish the crime should be subject to the reasonable doubt rule. If all facts unrelated to culpability were for that reason exempt from the rule, then for such crimes the state could imprison and stigmatize a defendant on proof of guilt by a preponderance of evidence, or perhaps even on failure by the defendant to prove his own innocence. That result would plainly violate the purposes of the reasonable doubt rule, as a commitment to individualized justice in criminal cases and as a shield against unjustified incarceration and the stigma of criminality.[146] If conviction entails

144. *See* Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825, *cert. denied*, 363 U.S. 848 (1959).

145. It has been suggested that for offenses not involving moral culpability, there should be no possibility of imprisonment or the stigma of criminality; such offenses should lead only to fines, and they should be given a neutral name, like "violation" or "civil offense." It would perhaps follow that the procedural requirements of a criminal prosecution could be eliminated as well. *See, e.g.*, Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 440-49 (196→ Perkins, *The Civil Offense*, 100 U. PA. L. REV. 832 (1952); MODEL PENAL CODE § 1.04 & Comment (Tent. Draft No. 4, 1955); *id.* § 6.03(4), (5).

146. Although *Patterson* offers few principles for finding the limits on the power of the state to shift the burden of persuasion to the defendant, the Court did reaffirm the proposition that in criminal cases the state may not constitutionally shift the burden to the defendant on *all* issues. 97 S. Ct. at 2327. Even in civil cases, where there is no such constitutional bar, laws seldom assign the defendant the burden of proof on the whole case. When they do, it is generally a case in which plaintiff is seeking to enforce the prior determination of an administrative agency. The prior administrative determination makes it rational to impose a presumption in favor of the plaintiff or agency. *E.g.*, 26 U.S.C. §§ 7401-7403 (1970 & Supp. V 1975) (suit by Government against taxpayer for collection of taxes previously assessed by IRS), *discussed in* United States v. Janis, 428 U.S. 433, 440-43 (1976); 7 U.S.C. § 210(f) (1970) (suit by farmer against packer-dealer for reparations ordered by Dep't of Agriculture), *discussed* → Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 763 n.95 (1976).

those consequences, then erroneous conviction is too serious to allow such cavalier treatment of the burden of proof, whether or not conviction involves a judgment of culpability. It is equally offensive to decide erroneously that stigma and incarceration are justified, whether the error involves a fact within the defendant's knowledge or control and therefore morally significant, or a fact beyond his knowledge or control but nevertheless significant as a measure of the legal wrongfulness of his act.

Culpability does not provide an exhaustive criterion for finding the facts subject to proof beyond a reasonable doubt, because the criminal law does not make culpability the sole determinant of the seriousness of a crime, or the wrongfulness of an act. But the problem suggests its own solution. Whether culpability or some other factor provides the justification for invoking the criminal sanction,[147] the facts that justify the sanction are the ones that should be subject to the reasonable doubt rule.

The central question in a criminal trial is whether the facts have occurred that justify criminal sanctions, whether the defendant has violated a specific criminal prohibition. When a legislature specifies that a fact is necessary to justify a particular criminal sanction, it makes the correct determination of that fact a matter of constitutional significance. All the facts that define or limit the defendant's criminal guilt stand on an equal footing with respect to the purposes of the reasonable doubt rule. For any such fact, whether it is characterized as an element of crime or a defense, an error that favors the government leads to the conviction of a person who is innocent of the crime charged. The risk of such an error provides the central occasion for invoking the symbolic and practical functions of the reasonable doubt rule.

Conclusion

Ultimately the principle expressed in *Winship* is that the invocation of the criminal sanction against an individual requires justification of an extraordinary type. For this reason, the conditions for invoking the sanction must be both specified and satisfied with more than usual care. Care in specifying the conditions is required by the constitutional prohibition of *ex post facto* laws, bills of attainder, and vague statutes. Care in satisfying the conditions is required by the

147. *See, e.g.*, the controversy over resulting harm as a measure of seriousness, discussed → note 133 *supra*.

constitutional rule that all doubts, even small ones, must be resolved in favor of the defendant, *i.e.*, that the government must prove its case beyond a reasonable doubt.

These two doctrines are intimately related. It would be useless to insist on precise criteria for conviction, formulated in advance of the event, if those criteria could be satisfied by low standards of proof. The requirement of precision, and the ban on *ex post facto* statutes, are not limited in their application to facts that define a crime rather than a defense, or to any other specially important facts in a criminal case; they govern all the facts that specify the conduct by which a person makes himself vulnerable to criminal sanctions.[148] The reasonable doubt rule should reach at least as far. Issues in the definition of crimes and defenses are protected from retroactive change, and from vague definition, because together they define the boundary conditions for culpable conduct. The careful delineation of those boundaries serves two important functions: to give fair warning to potential violators, and to limit the discretion of enforcement officials.[149] When there is a question whether in a particular case the boundary criteria have been met, it is important for both those functions that the government be held to rigorous standards of proof. If a fact has been specified as necessary to justify the invocation of the criminal sanction, then its determination is sufficiently important to require proof beyond a reasonable doubt.

148. What they do not govern is procedural matters. *See, e.g.*, Duncan v. Missouri, 152 U.S. 377, 382-83 (1894) (dictum) (ex post facto change of court); Cook v. United States, 138 U.S. 157, 183 (1891) (ex post facto venue change); Clements v. United States, 266 F.2d 397 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959) (ex post facto change in statute of limitations).

149. *See generally*, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).